DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1024
Title: Federal Aviation Administration, et al., Petitioners
v.
Stanmore Cawthon Cooper
Docketed: February 14, 2011
Linked with 10A569
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-17074)
Decision Date: February 22, 2010
Rehearing Denied: September 16, 2010
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Dec 3 2010	Application (10A569) to extend the time to file a petition for a writ of certiorari from December 15, 2010 to January 14, 2011, submitted to Justice Kennedy.
Dec 6 2010	Application (10A569) granted by Justice Kennedy extending the time to file until January 14, 2011.
Jan 4 2011	Application (10A569) to extend further the time from January 14, 2011 to February 13, 2011, submitted to Justice Kennedy.
Jan 12 2011	Application (10A569) granted by Justice Kennedy extending the time to file until February 13, 2011.
Feb 14 2011	Petition for a writ of certiorari filed. (Response due March 16, 2011)
Feb 14 2011	Appendix of Federal Aviation Administration, et al. filed.
Mar 8 2011	Order extending time to file response to petition to and including April 15, 2011.
Apr 7 2011	Order further extending time to file response to petition to and including May 16, 2011.
May 16 2011	Brief of respondent Stanmore Cawthon Cooper in opposition filed.
May 31 2011	DISTRIBUTED for Conference of June 16, 2011.
May 31 2011	Reply of petitioners Federal Aviation Administration, et al. filed. (Distributed)
Jun 20 2011	Petition GRANTED. Justice Kagan took no part in the consideration or decision of this petition.
Jul 21 2011	The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 19, 2011.
Jul 21 2011	The time to file respondent's brief on the merits is extended to and including September 27, 2011.
Aug 3 2011	Motion to dispense with printing the joint appendix filed by the Solicitor General.
Aug 19 2011	Brief of petitioners Federal Aviation Administration, et al. filed.
Sep 12 2011	SET FOR ARGUMENT ON Wednesday November 30, 2011.

Sep 19 2011	CIRCULATED
Sep 21 2011	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Sep 27 2011	Motion to dispense with printing the joint appendix filed by the Solicitor General GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Sep 27 2011	Brief of respondent Stanmore Cawthon Cooper filed. (Distributed)
Sep 30 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from the Solicitor General.
Oct 4 2011	Brief amicus curiae of National Whistleblower Center filed. (Distributed)
Oct 4 2011	Brief amicus curiae of Electronic Privacy Information Center filed. (Distributed)
Oct 4 2011	Brief amici curiae of AIDS Foundation of Chicago, et al. filed. (Distributed)
Oct 27 2011	Reply of petitioners Federal Aviation Administration, et al. filed. (Distributed)
Nov 30 2011	Argued. For petitioners: Eric J. Feigin, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent: Raymond A. Cardozo, San Francisco, Cal.
Mar 28 2012	Judgment REVERSED and case REMANDED Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, and Thomas, JJ., joined. Sotomayor, J., filed a dissenting opinion, in which Ginsburg and Breyer, JJ., joined. Justice Kagan took no part in the consideration or decision of this petition.

PETITION FOR WRIT OF CERTIORARI

No. 10-1024

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
AND SOCIAL SECURITY ADMINISTRATION,
PETITIONERS

v.

STANMORE CAWTHON COOPER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
MARK B. STERN
SAMANTHA L. CHAIFETZ
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a plaintiff who alleges only mental and emotional injuries can establish "actual damages" within the meaning of the civil remedies provision of the Privacy Act, 5 U.S.C. 552a(g)(4)(A).

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In the Supreme Court of the United States

No. 10-1024

UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, AND SOCIAL SECURITY ADMINISTRATION, PETITIONERS

v.

STANMORE CAWTHON COOPER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 14a-37a) is reported at 622 F.3d 1016, amending and superseding on denial of rehearing the opinion reported at 596 F.3d 538. The order of the district court (App., *infra*, 38a-64a) is unreported.

JURISDICTION

The original judgment of the court of appeals was entered on February 22, 2010. The court of appeals denied the government's petition for rehearing or rehearing en banc, and issued an amended opinion, on September 16, 2010 (App., *infra*, 1a-37a). On December 6, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 14, 2011. On January 12, 2011, Justice Kennedy further extended the time within which to file a petition for a writ of certiorari to and including February 13, 2011, which is a Sunday. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The civil remedies provision of the Privacy Act of 1974, 5 U.S.C. 552a(g) provides, in relevant part:

> (4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—
>
> > (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
> >
> > (B) the costs of the action together with reasonable attorney fees as determined by the court.

Other relevant provisions of the Privacy Act, including the full text of Section 552a, are reproduced in full in the appendix to this petition. App., *infra*, 65a-109a.

STATEMENT

1. The Privacy Act of 1974, 5 U.S.C. 552a, sets forth requirements for Executive Branch agencies in their collection, maintenance, use, and dissemination of "records" containing information about an "individual," when those records are maintained as part of a "system of records." 5 U.S.C. 552a(a)(1)-(5) and (b). One of the requirements of the Act is that, except in certain specified circumstances, "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person" without a request by or consent from "the individual to whom the record pertains." 5 U.S.C. 552a(b).

The Privacy Act authorizes private civil actions to enforce its terms. 5 U.S.C. 552a(g). While violations of some provisions entitle a plaintiff only to declaratory or injunctive relief, violations of other provisions, including the disclosure-related provision at issue in this case, may entitle a plaintiff to an award of money damages against the government. 5 U.S.C. 552a(g)(4). Such damages may only be awarded, however, if the plaintiff demonstrates both that the violation was "intentional or willful," *ibid.*, and that he sustained "actual damages * * * as a result of" the violation, 5 U.S.C. 552a(g)(4)(A). See *Doe* v. *Chao*, 540 U.S. 614, 624-625 (2004). If those elements are satisfied, the Act subjects the government to liability for the amount of "actual damages sustained by the individual" and provides that "in no case shall a person entitled to recovery receive less than the sum of $1,000." 5 U.S.C. 552a(g)(4)(A); see *Doe*, 540 U.S. at 627; see also 5 U.S.C. 552a(g)(4)(B) (reasonable litigation costs and attorney fees may be awarded to a prevailing plaintiff). The Act does not define the term "actual damages."

2. a. Respondent is a pilot who first obtained a private pilot's certificate from the Federal Aviation Administration (FAA) in 1964. App., *infra*, 15a. In order to operate an aircraft, the FAA requires a pilot not only to have a pilot's certificate, but also to have a valid medical certificate as well. *Ibid.*; 14 C.F.R. 61.3(a) and (c). FAA regulations require a pilot periodically to renew his medical certificate and to disclose in his renewal application any medical conditions he has had and any medications he is taking. App., *infra*, 15a; 14 C.F.R. 61.23(d); 14 C.F.R. Pt. 67.

In the mid-1980s, respondent learned that he was HIV-positive and began taking antiretroviral medication. App., *infra*, 15a-16a. He knew that he would not at that time have qualified for renewal of his medical certificate if he admitted his condition. *Ibid.* He nevertheless applied for and received a medical certificate in 1994 without disclosing his HIV status or that he was taking the medication. *Id.* at 16a.

For a period of time in the mid-1990s, respondent's HIV symptoms worsened to the point of creating a disability. App., *infra*, 16a. In 1995, he applied for long-term disability benefits from the Social Security Administration (SSA), disclosing his HIV-positive status on his application. *Ibid.* The SSA granted respondent's application and paid him disability benefits for a limited period until his health improved and he discontinued the benefits. *Ibid.*

Before applying for a medical certificate in 1998, petitioner became aware that the FAA had begun to grant medical certificates to HIV-positive pilots on a case-by-case basis through a "special issuance" procedure. App., *infra*, 114a. He nevertheless chose not to seek a special-issuance certificate and instead applied for and

obtained a medical certificate four additional times—in 1998, 2000, 2002, and 2004—without disclosing his actual medical condition. *Id.* at 114a-115a.

b. Respondent's deception of the FAA was uncovered in 2005 as a result of "Operation Safe Pilot," a joint criminal investigation by the offices of inspector general of the SSA and the FAA's parent agency, the Department of Transportation (DOT). App., *infra*, 17a-18a. The inspectors general of those agencies are law enforcement officers tasked with the responsibility for uncovering and preventing waste, fraud, or abuse in the agencies' programs or operations. Inspector General Act of 1978, 5 U.S.C. App. §§ 2, 4, 6; 42 U.S.C. 902; 49 U.S.C. 354.

Operation Safe Pilot was prompted by the discovery that a California pilot had consulted two sets of doctors in a scheme to obtain medical certification to fly while also receiving disability benefits. App., *infra*, 16a-17a. Concerned that such fraud might be more widespread, the offices of inspector general decided to investigate the veracity of medical information submitted by persons in northern California who had successfully applied for both certification to fly and disability benefits. *Id.* at 17a. The DOT provided the SSA with the names, dates of birth, social security numbers, and genders of 45,000 licensed pilots with current medical certificates in northern California. *Ibid.* The SSA compared the list with its own records of benefits recipients and summarized the results in spreadsheets, which it provided to the DOT. *Ibid.*

When agents from the DOT and SSA examined the spreadsheets, they discovered that respondent was a licensed pilot with a current medical certificate and had received disability benefits. App., *infra*, 17a-18a. FAA

flight surgeons reviewed respondent's FAA medical file and SSA disability file and concluded that respondent would not have received an unrestricted medical certificate if his true medical condition had been known. *Id.* at 18a.

When confronted with this information, respondent admitted that he had intentionally withheld his HIV status and related medical information from the FAA. App., *infra*, 18a. His pilot's license was revoked because of his misrepresentations, and he was indicted on three counts of making false statements to a government agency, in violation of 18 U.S.C. 1001. *Ibid.* Respondent eventually pleaded guilty to one count of making and delivering a false official writing, in violation of 18 U.S.C. 1018. App., *infra*, 18a. He was sentenced to two years of probation and fined $1000. *Ibid.*

3. Respondent thereafter filed suit in the District Court for the Northern District of California against the DOT, FAA, and SSA, claiming that these agencies willfully or intentionally violated the Privacy Act by sharing records as part of Operation Safe Pilot. App., *infra*, 19a; see 28 U.S.C. 1331. He alleged that the information sharing, which revealed his HIV status to the FAA, "caused him 'to suffer humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress,'" and he sought recovery for those asserted emotional harms. App., *infra*, 19a. Respondent did not, however, allege any direct or indirect pecuniary harm. *Id.* at 15a.

The district court granted summary judgment for the government. App., *infra*, 38a-64a. The court believed that Operation Safe Pilot had violated the Privacy Act (*id.* at 51a-58a) and that respondent had raised a triable issue as to whether the violation was intentional

or willful (*id.* at 58a-59a). But the court concluded that respondent had failed to make out a claim for "actual damages." *Id.* at 59a-64a. Observing that principles of sovereign immunity require strict construction of the Privacy Act's "actual damages" provision, 5 [U.S.C.] 552a(g)(4)(A), the court held that the provision cannot be satisfied where nonpecuniary harm, such as mental distress, is alleged. App., *infra*, 61a-64a. The court concluded that "the term 'actual damages' is facially ambiguous" (*id.* at 61a) and reasoned that "ambiguity as to whether 5 U.S.C. § 552a(g)(4)(A)'s provision for actual damages includes mental distress without evidence of pecuniary damages must be resolved in favor of the government defendants" (*id.* at 63a).

4. A panel of the court of appeals for the Ninth Circuit reversed and remanded. App., *infra*, 14a-37a.*

The court of appeals agreed with the district court that, because the term "actual damages" appears in the context of a provision that waives federal sovereign immunity, "any ambiguities in the statutory text * * * must be strictly construed in favor of the sovereign." App., *infra*, 32a (citing *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)). "[I]f actual damages is susceptible of two plausible interpretations," the court explained, "nonpecuniary damages are not covered." *Id.* at, 34a; see also *ibid.* (discussing *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992)).

The court of appeals reasoned that the term "actual damages" has no "ordinary or plain" meaning because it

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* Citations herein to the panel opinion are citations to the superseding amended version of that opinion issued upon denial of rehearing. The amendment, which deleted a single footnote, did not alter the original opinion in any manner relevant to the question presented here. See p. 10, *infra*.

is a "legal term of art"; that the definition in *Black's Law Dictionary* "sheds little light" on the term's meaning in the Privacy Act; and that the use of the term in other statutory contexts reveals it to be a "chameleon," the meaning of which "changes with the specific statute in which it is found." App., *infra*, 23a-24a. The court also believed the legislative history of the Privacy Act was "of no help" in interpreting the term, both because legislative history cannot supply the requisite clarity for a waiver of sovereign immunity and because, in the court's view, the legislative history concerning the meaning of "actual damages" was "murky, ambiguous, and contradictory." *Id.* at 28a-29a. The court additionally recognized that its sister circuits were in conflict over whether "actual damages" under the Privacy Act include nonpecuniary harms, with two circuits saying no, another saying yes, and courts on both sides of the divide agreeing that the term is "ambiguous." *Id.* at 21a-23a (citing *Fitzpatrick* v. *IRS*, 665 F.2d 327, 331 (11th Cir. 1982) (nonpecuniary damages not recoverable), abrogated in part on other grounds by *Doe*, 540 U.S. 614; *Hudson* v. *Reno*, 130 F.3d 1193, 1207 (6th Cir. 1997) (nonpecuniary damages not recoverable), cert denied, 525 U.S. 822 (1998) (not presenting this issue), abrogated in part on other grounds by *Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001); *Johnson* v. *IRS*, 700 F.2d 971, 972 (5th Cir. 1983), abrogated in part on other grounds by *Doe*, 540 U.S. 614 (nonpecuniary damages recoverable)).

The court of appeals nevertheless concluded that the term "actual damages" was "unambiguous" and that "a construction that limits recovery to pecuniary loss" was not "plausible." App., *infra*, 34a. The court offered two bases for its conclusion: the term's "statutory context"

(*id.* at 24a) and an analogy to the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.* (App., *infra*, 29a-30a).

With regard to the statutory context of the term "actual damages," the court first pointed to the Privacy Act's preambular statement of purpose, which states that federal agencies should "be subject to civil suit for *any damages*" resulting from an intentional or willful violation of rights under the Act. App., *infra*, 24a-25a (quoting Privacy Act of 1974, Pub. L. No. 93-579, § 2(b)(6), 88 Stat. 1896) (emphasis added by court). The court found it "difficult to see" how Congress could have achieved that goal unless the Act permitted recovery for mental or emotional distress, suggesting that it is common for privacy violations to result in such distress. *Id.* at 25a-26a. The court also claimed to find support for its interpretation of the Act in substantive provisions that list prevention of "embarrassment" and assurance of "fairness in any [record-based] determination relating to * * * character" among the purposes of the Act. *Id.* at 26a (citing 5 U.S.C. 552a(e)(10), 552a(g)(1)(C)) (emphasis omitted). The court additionally focused on 5 U.S.C. 552a(g)(1)(D), which permits suit by an individual who has suffered an "adverse effect," and reasoned that because "adverse effect" typically includes nonpecuniary harms, "actual damages" should be read in the same way. App. *infra*, 26a.

With regard to the FCRA, the court of appeals perceived similarities "in purpose and time" between the two statutes that, in its view, made the FCRA "a reliable extrinsic source" for interpreting the meaning of "actual damages" in the Privacy Act. App., *infra*, 31a. The FCRA was enacted "within a few years of" the Privacy Act and prohibited "credit reporting agencies from re-

leasing consumer credit reports" except in certain circumstances. *Id.* at 30a. According to the court of appeals, the FCRA and the Privacy Act "address[ed] an identical concern growing out of closely analogous circumstances," and circuit precedent interpreting "actual damages" recoverable under the FCRA to include emotional-distress damages "buttresse[d]" a similar construction of the term "actual damages" in the Privacy Act. *Id.* at 30a-31a.

5. The government petitioned for rehearing or rehearing en banc. The court of appeals denied the petition, but the panel issued a slightly amended opinion (which deleted a footnote not relevant here). App., *infra*, 1a-37a.

Judge O'Scannlain, joined by seven other judges, dissented from the order denying rehearing en banc. App., *infra*, 8a-14a. The dissent criticized the panel for "neglect[ing]" the canon requiring strict construction of sovereign-immunity waivers (*id.* at 9a), and cautioned that "[w]e ignore at our peril [that] well-established clear statement rule" (*id.* at 13a). "The effect of today's order," the dissent stated, "is to open wide the United States Treasury to a whole new class of claims without warrant." *Id.* at 9a. The dissent observed that "[i]n so doing," the decision "exacerbate[d] a circuit split that had been healing under the strong medicine of recent sovereign immunity jurisprudence." *Ibid.*

Judge Milan Smith, the author of the panel opinion, wrote a concurrence in the denial of rehearing en banc. See App., *infra*, 2a-8a. He defended the panel's sovereign-immunity analysis, explaining that "[t]o construe the scope of this waiver, the panel followed controlling precedent directing the panel to look to the policies or objectives underlying the Act." *Id.* at 3a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's broad interpretation of the Privacy Act's limited waiver of sovereign immunity warrants this Court's review. The Privacy Act contains a carefully crafted remedial scheme that permits actions for monetary relief against the federal government only when intentional or willful violations of specified provisions of the Act are shown to have caused "actual damages." 5 U.S.C. 552a(g)(4); see *Doe* v. *Chao*, 540 U.S. 614, 620-621, 624 (2004). As the court of appeals recognized, "a waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text," and any ambiguity in the scope of such a waiver must be construed narrowly in the government's favor. App., *infra*, 32a (quoting *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)). Yet despite "all but admit[ting] that the statutory term 'actual damages' does *not* unequivocally express a waiver for nonpecuniary damages," the court of appeals interpreted the Privacy Act to permit recovery of such damages from the government. *Id.* at 10a (O'Scannlain, J., dissenting from denial of rehearing en banc) (emphasis added).

The Ninth Circuit's failure properly to adhere to the well-settled sovereign-immunity canon in this context dramatically increases the government's exposure to damages under the Privacy Act in the Nation's largest geographic circuit. The decision below additionally extends an existing division among the courts of appeals. Whereas the Sixth and Eleventh Circuits have correctly concluded that the Privacy Act does not subject the government to liability for nonpecuniary harm, the Fifth Circuit and now the Ninth Circuit have both held the opposite and denied petitions for en banc review. This Court's intervention is necessary to correct the errone-

ous interpretation of the Ninth Circuit and to resolve this recurring and important issue.

A. The Ninth Circuit Erred In Construing The Privacy Act To Waive Sovereign Immunity For Claims Of Nonpecuniary Harm

The court of appeals correctly recognized that the proper interpretation of "actual damages" is guided by the "common rule, with which we presume congressional familiarity," that the federal government is immune from suit unless it has expressly and unequivocally waived its immunity in the statutory text. *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992); see App., *infra*, 32a-36a. In keeping with this rule, the court of appeals acknowledged that "if actual damages is susceptible of two plausible interpretations," then the term must be construed "narrowly in favor of the Government," meaning "that nonpecuniary damages are not covered." App., *infra*, 34a; see *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) (explaining that the existence of a "plausible" reading of a statutory waiver that excludes a plaintiff's damage claim "is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted"). The court of appeals proceeded to conclude, however, that the Privacy Act's reference to "actual damages" admits of only one meaning: a broad definition that encompasses nonpecuniary damages, such as damages for emotional distress and mental anxiety. App., *infra*, 34a.

The court of appeals' conclusion—that "actual damages" cannot plausibly be limited to pecuniary losses—is untenable. The Privacy Act supplies no definition for "actual damages." All four appellate courts to consider

the issue have agreed that the term "actual damages" has no single definition, and it is clear that the term can be used to refer exclusively to pecuniary harm. See App., *infra*, 23a-24a; *Johnson* v. *IRS*, 700 F.2d 971, 974 (5th Cir. 1983), abrogated in part on other grounds by *Doe*, 540 U.S. 614; *Fitzpatrick* v. *IRS*, 665 F.2d 327, 329 (11th Cir. 1982), abrogated in part on other grounds by *Doe*, 540 U.S. 614; *Hudson* v. *Reno*, 130 F.3d 1193, 1207 n.11 (6th Cir. 1997), cert denied, 525 U.S. 822 (1998) (not presenting this issue), abrogated in part on other grounds by *Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001). The Privacy Protection Study Commission, which was established by Congress in the Privacy Act to study, *inter alia*, the Act's damages provision, Pub. L. No. 93-579, § 5(c)(2)(B)(iii), 88 Stat. 1907 (1974), similarly concluded in its official report to Congress "that there is no generally accepted definition of 'actual damages' in American law." Privacy Protection Study Commission, *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* 530 (1977) (*Privacy Commission Report*). As an undefined term that permits more than one meaning, "actual damages" cannot reasonably be described as "unambiguous." App, *infra*, 34a; see, *e.g.*, *Nordic Village, Inc.*, 503 U.S. at 37; *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917).

None of the sources relied upon by the court of appeals supports its holding. To begin with, one of the court of appeals' primary rationales "quite clearly" conflicts with this Court's decision in *Doe* v. *Chao*, *supra*. App., *infra*, 12a-13a (O'Scannlain, J., dissenting from denial of rehearing en banc). The court of appeals believed that because the Privacy Act permits suit by a person who has suffered an "adverse effect," and be-

cause several circuits have interpreted the term "adverse effect" to include emotional harm, it would be "unreasonable" to interpret "actual damages" to exclude such harm. *Id.* at 27a-28a.

Doe made clear, however, that the "adverse effect" and "actual damages" requirements are distinct. 540 U.S. at 624-625. The "adverse effect" requirement, the Court explained, has the "limited but specific function" of "identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing," whereas the "actual damages" requirement addresses the right to monetary recovery. *Id.* at 625. An "adverse effect" is insufficient by itself to establish "a complete cause of action" under Section 552a(g)(1)(D); the statute also "require[s] some actual damages as well." *Id.* at 624; see *id.* at 624-625 ("[A]n individual subjected to an adverse effect has injury enough to open the courthouse door, but without more has no cause of action for damages under the Privacy Act."). The court of appeals therefore erred in equating the two requirements. See App., *infra*, 12a ("[T]he court's recourse to the Privacy Act's standing provision * * * is the most troubling [aspect of the decision], because it conflicts with the Supreme Court's interpretation of the very provision of the Privacy Act at issue in this case.") (O'Scannlain, J., dissenting from denial of rehearing en banc).

The court of appeals also erred in placing significant weight on a statement in the Privacy Act's preamble that agencies will be "subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." § 2(b)(6), 88 Stat. 1896; see App., *infra*, 24a-25a. That generic language neither supersedes nor accu-

rately describes the operative text of the specific remedial provisions of the Act. Many violations of the Act do not give rise to a cause of action for damages under any circumstances. 5 U.S.C. 552a(g)(2)-(3) (providing only injunctive relief, not money damages, for violations of the provisions addressed in Section 552a(g)(1)(A) and (B)). And if Congress had in fact meant to authorize the recovery of "any damages" for other types of violations, the unequivocal way to express its intent would have been to use that term, rather than the distinct and narrower term "actual damages," in the operative text of Section 552a(g)(4). See App., *infra*, 11a (O'Scannlain, J., dissenting from denial of rehearing en banc).

The court of appeals' strained effort to find an unambiguous waiver by looking to other provisions of the Act similarly falls short. The court focused on Section 552a(e)(10), which mentions potential "embarrassment" as a reason why agencies must adequately safeguard records, and Section 552a(g)(1)(C), which permits suit by a person who suffers an adverse official determination as a result of an agency's failure to properly maintain a record concerning (among other possibilities) a person's "character." App., *infra*, 26a. Neither subsection purports to interpret "actual damages," a term that applies not only to cases involving those subsections, but to a much broader set of cases (including the present case). Congress's recognition that certain Privacy Act violations may cause embarrassment does not demonstrate—let alone unequivocally demonstrate—that Congress waived sovereign immunity in any suit in which a plaintiff seeks damages for embarrassment. Had Congress intended that result, it would have drafted the Act's damages provision differently: it would not have limited recovery to "intentional or willful" violations,

5 U.S.C. 552a(g)(4), and it would have used a nonambiguous term in place of "actual damages," 5 U.S.C. 552a(g)(4)(A). Indeed, as Congress is presumed to have known, see *United States Dep't of Energy*, 503 U.S. at 615, it would have been required under this Court's cases to use such language to effect a waiver of the United States' sovereign immunity.

Finally, the court of appeals' interpretation of the FCRA cannot supply an unequivocal waiver of sovereign immunity for the Privacy Act. As the court of appeals acknowledged, the meaning of "actual damages" "changes with the specific statute in which it is found." App., *infra*, 24a. The FCRA, enacted four years before the Privacy Act, was directed at "consumer reporting agencies," not federal executive agencies. 15 U.S.C. 1681(a)(4) and (b); see App., *infra*, 29a. Even assuming that "actual damages" recoverable from the former include emotional harms, see 15 U.S.C. 1681n, 1681o, there is no evidence, let alone unequivocal textual evidence, that Congress intended a similar scope for the Privacy Act's waiver of sovereign immunity.

To the contrary, the conclusion of the Privacy Protection Study Commission in 1977, shortly after the Act was passed, was that "Congress meant to *restrict* recovery to specific pecuniary losses." *Privacy Commission Report* 530 (emphasis added). In carrying out its congressionally assigned function to study and make recommendations regarding the remedial provisions of the Act, § 5(c)(2)(B)(iii), 88 Stat. 1907, the Commission "concluded that, within the context of the Act," the term "actual damages" was "intended as a synonym for special damages as that term is used in defamation cases." *Privacy Commission Report* 530; cf. *Doe*, 540 U.S. at 625 (observing that Privacy Act's remedial scheme mir-

rors defamation damages in certain respects). Such "special damages," the Commission explained, consist of "loss of *specific* business, employment, or promotion opportunities, or other tangible pecuniary benefits." *Privacy Commission Report* 530. They do not include injuries "which may be labeled intangible: namely, loss of reputation, chilling of constitutional rights, or mental suffering (where unaccompanied by other secondary consequences)." *Ibid.*

While the Commission's contemporaneous understanding may not be the only possible interpretation, it is, at a minimum, reasonable. See, *e.g.*, *Fitzpatrick*, 665 F.2d at 331 (considering the Commission's analysis "persuasive authority"). The most that could be said of the court of appeals' analysis is that it suggests another plausible interpretation. Under this Court's sovereign-immunity jurisprudence, that is not enough to support a broad construction of a sovereign-immunity waiver. See *Nordic Village, Inc.*, 503 U.S. at 37; see also *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) ("We have frequently held * * * that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign.").

B. The Ninth Circuit's Holding Deepens A Longstanding And Entrenched Conflict In The Circuits

Even before the Ninth Circuit's decision in this case, the circuits had been divided on the question presented. App., *infra*, 21a-22a. In the early 1980s, the Eleventh and Fifth Circuits reached conflicting conclusions about the meaning of "actual damages" based on the legislative history of the Privacy Act. Whereas the Eleventh Circuit held that "actual damages" are limited to "proven pecuniary losses," *Fitzpatrick*, 665 F.2d at 331, the

Fifth Circuit held the following year that "actual damages" also include "proven mental * * * injuries," *Johnson*, 700 F.2d at 972.

This Court subsequently stressed—in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), and other cases—that the canon of strict construction applies not only to determining the existence of a waiver of sovereign immunity, but also to determining its scope. Applying that principle, the Sixth Circuit in 1997 expressly rejected the Fifth Circuit's analysis for "fail[ing] to recognize the bedrock principle that courts must strictly construe waivers of immunity in favor of the sovereign." *Hudson*, 130 F.3d at 1207 n.11. The Sixth Circuit concluded, in conflict with the Fifth Circuit but consistent with the Eleventh Circuit, "that actual damages only mean out-of-pocket losses, not emotional distress." *Ibid.*

In its *Doe* decision in 2004, this Court acknowledged the longstanding conflict, but declined to resolve it because it had not been presented in the petition for certiorari. 540 U.S. at 627 n.12; see *id.* at 622 n.5. Since *Doe*, both the Fifth and Eleventh Circuits have held that their earlier decisions remain good law. *Fanin* v. *United States Dep't of Veterans Affairs*, 572 F.3d 868, 872 (11th Cir. 2009), cert. denied, 130 S. Ct. 1755 (2010); *Jacobs* v. *National Drug Intelligence Ctr.*, 548 F.3d 375, 377 (5th Cir. 2008). The court of appeals here recognized that its holding, while in line with the Fifth Circuit, directly conflicts with the conclusions of the Sixth and Eleventh Circuits. App. *infra*, 21a-22a.

There is no reasonable prospect that the conflict will resolve itself without this Court's intervention. The Fifth Circuit has expressly declined to decide "whether a present-day analysis of damages recoverable under the Privacy Act would differ from" its earlier examina-

tion of the subject, based on the Court's current sovereign-immunity jurisprudence. *Jacobs*, 548 F.3d at 378. And both the Fifth and Ninth Circuits have refused to reconsider the issue en banc. App., *infra*, 2a; *Jacobs*, 07-40776 Docket entry (5th Cir. Jan. 6, 2009).

The division of authority on the question presented is accordingly entrenched and ripe for this Court's review. Although the United States previously opposed a petition for a writ of certiorari from the Eleventh Circuit raising this issue, see Br. in Opp., *Perkins* v. *Department of Veterans Affairs* (No. 09-513), it did so before the Ninth Circuit panel had issued its decision in this case, see *id.* at 14 n.4 (noting that the case was pending), and thus at a time when only the Fifth Circuit had held that damages could be recovered for a nonpecuniary injury. Recognizing that circumstances might change, the government's brief in opposition noted the possibility that the "currently narrow conflict in the circuits would warrant this Court's resolution in an appropriate case in the future." *Id.* at 14. As Judge O'Scannlain observed for eight judges dissenting from the denial of rehearing en banc, the Ninth Circuit panel's decision "exacerbate[s] a circuit split that had been healing under the strong medicine of recent sovereign immunity jurisprudence." App., *infra*, 9a. The erroneous decision of the Ninth Circuit (the Nation's largest geographic circuit), and that court's subsequent refusal to grant rehearing en banc, demonstrate that the conflict has now reached the point where certiorari is necessary.

C. The Availability Of Privacy Act Damages For Nonpecuniary Harm Is An Important And Recurring Legal Question

The question presented also has broad significance. "The proliferation of electronic records raises the stakes of a broader waiver of sovereign immunity, increasing the fiscal exposure of the United States to the tune of a $1000 minimum statutory award per claim." App., *infra*, 13a-14a (O'Scannlain, J., dissenting from denial of rehearing en banc). The Privacy Act applies to "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. 552(f); see 5 U.S.C. 552a(a)(1) & References In Text. Case-tracking data collected by the Department of Justice indicate that such entities have been named as defendants in more than 400 separate Privacy Act suits (seeking either damages or other relief) since the start of 2005.

The court of appeals' erroneous decision expands the impact of Privacy Act litigation in two important ways. First, the decision opens the door to additional damages suits from plaintiffs who otherwise would not have any monetary claim against the government. In this case, for example, even though respondent suffered no pecuniary losses, the court of appeals has now reinstated his claim for an unspecified amount of emotional damages, exposing the government to potential liability and requiring it to expend resources defending against the suit.

Second, by permitting such uncapped emotional-distress damages allegations to proceed, the decision great-

ly increases the government's potential exposure even in cases in which a plaintiff might have been able to claim some pecuniary loss. Damages for emotional distress or other claims of intangible injury are likely to be much more open-ended than for concrete pecuniary losses. Cf. *Privacy Commission Report* 531 (unenacted recommendation of Privacy Protection Study Commission that Act be amended to permit noneconomic damages only up to a maximum of $10,000). Such heightened damages claims would impress upon the public fisc not only by increasing the payout if the plaintiff obtains a favorable judgment, but also by enhancing the plaintiff's settlement leverage and escalating the cost of litigation. Discovery is much more expensive when emotional harms are alleged: while pecuniary damages can generally be proven through pay records, receipts, and the like, litigation over asserted mental distress could be much more extensive and typically will require expert discovery of opposing psychologists and cause the government to seek an independent medical examination of the plaintiff.

By forcing the government to bear these additional costs, in the absence of a clear waiver of sovereign immunity, the Ninth Circuit has disrupted the Privacy Act's carefully calibrated remedial scheme. It is "undisputed" that Congress, in enacting Section 552a(g)(4), sought to "deter[] violations and provid[e] remedies when violations occur," but "did not want to saddle the Government with disproportionate liability." *Doe*, 540 U.S. at 637 (Ginsburg, J., dissenting). This Court's review is warranted to correct the Ninth Circuit's misinterpretation of the Act, to resolve the conflict among the courts of appeals, and to restore the balance that Congress struck.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
MARK B. STERN
SAMANTHA L. CHAIFETZ
Attorneys

FEBRUARY 2011

APPENDIX

No. 10-1024

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
AND SOCIAL SECURITY ADMINISTRATION,
PETITIONERS

v.

STANMORE CAWTHON COOPER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
MARK B. STERN
SAMANTHA L. CHAIFETZ
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-17074

STANMORE CAWTHON COOPER, PLAINTIFF-APPELLANT

v.

FEDERAL AVIATION ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION; UNITED STATES DEPARTMENT OF TRANSPORTATION,
DEFENDANTS-APPELLEES

Filed: Feb. 22, 2010
Amended: Sept. 16, 2010

ORDER

Before: MYRON H. BRIGHT,* HAWKINS, and MILAN D. SMITH, JR., Circuit Judges

Order; Concurrence to Order by Judge MILAN D. SMITH, JR.; Dissent to Order by Judge O'SCANNLAIN; Opinion by Judge MILAN D. SMITH, JR.

The opinion filed February 22, 2010, and published at 596 F.3d 538, is hereby amended by deleting footnote 2

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

(and renumbering succeeding footnotes) on pages 2825-26 of the slip opinion (also found at 596 F.3d 538, 543-44).

With this amendment, the panel votes to deny the petition for panel rehearing. Judge M. Smith votes to deny the petition for rehearing en banc, and Judges Bright and Hawkins so recommend.

The full court was advised of the petition for rehearing en banc. After a request for a vote by an active judge, a vote was taken, and a majority of the active judges of the court failed to vote for a rehearing en banc. Fed. R. App. P. 35(f).

The petitions for panel rehearing and rehearing en banc are DENIED. Further petitions for rehearing and rehearing en banc shall not be entertained.

MILAN D. SMITH, JR., Circuit Judge, concurring in the order denying rehearing en banc:

I write to respond briefly to the dissent filed with this order.

The Privacy Act (Act) unequivocally waives sovereign immunity. Under the Act, if a "court determines that [an] agency acted in a manner which was intentional or willful, the United States *shall be liable* to the individual in an amount equal to the sum of . . . *actual damages* sustained by the individual as a result of the refusal or failure" to comply with the Privacy Act. 5 U.S.C. § 552a(g)(4) (emphases added). In light of that unconditional waiver, we appropriately followed Justice Cardozo's admonition: "'The exemption of the sovereign from suit involves hardship enough, where

consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced.'" *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 383, 70 S. Ct. 207, 94 L. Ed. 171 (1949) (quoting *Anderson v. Hayes Constr. Co.*, 243 N.Y. 140, 153 N.E. 28, 29-30 (1926)).

Our dissenting colleague mistakenly asserts that our opinion waives the sovereign immunity of the United States. In fact, Congress did so. Thus, the issue in this case is not the *existence* of a waiver, but rather the *scope* of that express waiver, as contemplated in the Act. To that end, we correctly construed the waiver to allow the recovery of nonpecuniary damages, based upon clear congressional intent.

I

The sovereign immunity canon requires that governmental waivers of sovereign immunity be "unequivocally expressed." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992) (internal quotation marks omitted). The canon has clearly been satisfied in this case. The Act categorically waives the federal government's immunity from suit and indisputably authorizes the recovery of "actual damages." The government's surrender to liability for damages is in the plain text of the Act itself, leaving us only to construe the scope of that surrender.

To construe the scope of this waiver, the panel followed controlling precedent directing the panel to look to the policies or objectives underlying the Act. *See, e.g., Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95, 111 S. Ct. 453, 112 L. Ed. 2d. 435 (1990) (construing the scope of a waiver of sovereign immunity that reflects "a

realistic assessment of legislative intent"); *Franchise Tax Bd. of Cal. v. Postal Serv.*, 467 U.S. 512, 514-16, 521, 104 S. Ct. 2549, 81 L. Ed. 2d 446 (1984) (rejecting the government's narrow construction of the scope of the waiver of sovereign immunity under 39 U.S.C. § 401 and holding that "the scope of such a waiver can only be ascertained by reference to underlying congressional policy"); *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 921-22 (9th Cir. 1995) (holding that a narrow construction of sovereign immunity under the Navajo-Hopi Settlement Act was improper in light of "the overriding congressional purpose behind the Settlement Act"); *United States v. Oregon*, 44 F.3d 758, 766 (9th Cir. 1994) ("The Supreme Court has repeatedly looked to indicia of Congressional intent in order to construe the scope of the unequivocally expressed waiver of immunity in the McCarran Amendment."); *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1151 (9th Cir. 1991) ("It is well established that when the federal government waives its immunity, the scope of the waiver is construed to achieve its remedial purpose.").

II

The dissent wrongly concludes that the court's observation that the term "actual damages," standing alone, is ambiguous necessarily means that the Act does not waive sovereign immunity for nonpecuniary damages. Our jurisprudence has clarified that "[r]ather than focusing just on the word or phrase at issue, this court looks to the entire statute to determine Congressional intent." *Sanchez v. Pac. Powder Co.*, 147 F.3d 1097, 1099 (9th Cir. 1998). "Thus, the structure and purpose of a statute may also provide guidance in determining the plain meaning of its provisions." *The Wilderness Soc'y*

v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc).

Accordingly, we looked to several sources manifesting the Act's overall objective. We noted the Act's preambular statement of purpose, wherein Congress stated that "[t]he purpose of this act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring federal agencies . . . to . . . be subject to civil suit for *any damages* which occur as a result of willful or intentional action which violates any individual's rights under this Act." Pub. L. No. 93-579, § 2(b)(6) (emphasis added). We highlighted the Act's requirement that agencies maintain records "to protect against any anticipated threats or hazards . . . which could result in . . . embarrassment." 5 U.S.C. § 552a(e)(10). We also observed the Act provides a remedy for an agency's violation that inhibits a fair determination relating to one's "character." § 552a(g)(1)(C). Such sources provided helpful guidance in discerning Congress's remedial aim in enacting the Act.

Understanding that "statutory language cannot be construed in a vacuum," *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989), the panel construed the term "actual damages" in its proper context, *see id.*, to conclude that it unequivocally encompasses nonpecuniary damages. When a statute is ambiguous, the doctrine of sovereign immunity is useful as "a tool for interpreting the law." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 128 S. Ct. 2007, 2019, 170 L. Ed. 2d 960 (2008). When a statute is not ambiguous, however, "[t]here is no need for us to resort to the sovereign immunity canon." *Id.* Because "there [was] no ambiguity left for us to construe,"

id., the application of the sovereign immunity canon was unnecessary in this case.

Further, "[t]he sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction." *Id.*; *see also Clark v. Martinez*, 543 U.S. 371, 382, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005) ("The canon is thus a means of giving effect to congressional intent, not of subverting it."); *Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001) (noting that "canons are not mandatory rules" but guides "designed to help judges determine the Legislature's intent," and that "other circumstances evidencing congressional intent can overcome their force"). Based upon the clear congressional intent as to the scope of "actual damages" under the Privacy Act, this court properly concluded that the government could not "carry the day by invoking general maxims of judicial policy." *Town & Country*, 963 F.2d at 1152.

III

The dissent misconstrues the relationship between the requirement of showing an "adverse effect" and that of "actual damages." In *Doe v. Chao*, the Court held that "an individual subjected to an adverse effect has injury enough to open the courthouse door." 540 U.S. 614, 624-25, 124 S. Ct. 1204, 157 L. Ed. 2d 1122 (2004). A majority of the circuits in this country, including our own, has held that mental distress or emotional harm is sufficient to constitute an adverse effect. *See, e.g.*, *Englerius v. Veterans Admin.*, 837 F.2d 895, 897 (9th Cir. 1988).

Under the dissent's view, a plaintiff is entitled to establish standing for an injury under the Act that results in a nonpecuniary harm, but is not entitled to seek actual damages for such a nonpecuniary injury. Such a construction of the Act would clearly frustrate the intent of Congress. In contrast, our opinion is true to the overall objective of the Act, allowing a plaintiff who demonstrates a nonpecuniary adverse effect to have the opportunity to recover nonpecuniary damages, to the extent the plaintiff can proffer the requisite degree of competent evidence that there is a real and tangible nonpecuniary injury. Our opinion is also consistent with the familiar rule of statutory construction that remedial legislation should be construed broadly to effectuate its purposes. *See, e.g., Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1176 (9th Cir. 2006) (concluding the remedial nature of the Fair Debt Collection Practices Act required a liberal construction); *Stewart Title Guar. Co. v. Park*, 250 F.3d 1249, 1252 (9th Cir. 2001) ("The purpose of the statute is remedial, and, therefore, should be given a liberal construction[.]"); *see also Wilson v. Libby*, 535 F.3d 697, 703 (D.C. Cir. 2008) (characterizing the Privacy Act as "a comprehensive remedial scheme").

IV

Controlling precedent in cases such as *Franchise Tax Board*, *Hopi Tribe*, and *Town & Country*, requires us to construe the scope of the Act's unequivocal waiver of sovereign immunity in light of the underlying congressional policy, and with the purpose of achieving the remedial goal of that waiver. The multiple sources the panel consulted reveal a clear and focused intent on the part of Congress to grant complete relief to those in-

jured by willful violations of the Act. Given that intent, Congress's provision that the federal government be liable for "actual damages" constitutes an unequivocal expression of the federal government's waiver of its own sovereign immunity for nonpecuniary injuries. The panel concluded there was no other plausible explanation for this unqualified language.

In conclusion, our dissenting colleague reminds us that "[o]nly Congress has the keys to unlock our country's Treasury." Dissent at 14253-54. But Congress used its keys and opened that door for plaintiffs injured by willful violations of the Act when it expressly gave plaintiffs the right to sue the government for actual damages. A court must not act "as a self-constituted guardian of the Treasury [to] import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 69, 76 S. Ct. 122, 100 L. Ed. 48 (1955).[1]

V

The panel's decision is compelled by the precedents of the Supreme Court and this court for construing the scope of a waiver of sovereign immunity, and the court properly denied rehearing this case en banc.

O'SCANNLAIN, Circuit Judge, dissenting from the order denying rehearing en banc, joined by KOZINSKI, Chief

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[1] Our opinion will not "saddle the Government with disproportionate liability," *Doe*, 540 U.S. at 637, 124 S. Ct. 1204 (Ginsburg, J., dissenting), as the dissent suggests. Our opinion does not relieve the plaintiff of his burden of producing evidence sufficient for a jury to find that the emotional harm he claims to have suffered was tangible and severe enough to give rise to actual damages. It simply gives the plaintiff his day in court so he can present competent evidence of his injury.

Judge, and GOULD, TALLMAN, BYBEE, CALLAHAN, BEA, and N.R. SMITH, Circuit Judges:

The Supreme Court has consistently held that the sovereign immunity of the United States may be waived only by an unequivocal expression in statutory text. *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996). Today, our court neglects this principle by leaving in place a decision that the term "actual damages" in the Privacy Act, 5 U.S.C. § 552a(g)(4)(A), is sufficient to deem sovereign immunity waived for nonpecuniary damages, even though the opinion itself admits that the term is not defined in the statute, has no plain meaning, has no fixed legal meaning, and indeed, is a "chameleon." *Cooper v. FAA*, 596 F.3d 538, 544-45 (9th Cir. 2010). Even more troubling, the opinion relies on abstract legislative intent and an interpretation of the Privacy Act that the Supreme Court recently rejected in *Doe v. Chao*, 540 U.S. 614, 124 S. Ct. 1204, 157 L. Ed. 2d 1122 (2004). The effect of today's order is to open wide the United States Treasury to a whole new class of claims without warrant. In so doing, we exacerbate a circuit split that had been healing under the strong medicine of recent sovereign immunity jurisprudence.[2] Hence, it is most unfortunate that we did not rehear this case en banc.

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[2] *Compare Hudson v. Reno*, 130 F.3d 1193, 1207 & n.11 (6th Cir. 1997) (holding Privacy Act does not waive sovereign immunity for nonpecuniary damages), *and Fanin v. Dep't of Veterans Affairs*, 572 F.3d 868, 872-75 (11th Cir. 2009) (following *Fitzpatrick v. IRS*, 665 F.2d 327, 329-31 (11th Cir. 1982)) (same), *with Johnson v. IRS*, 700 F.2d 971, 974-86 (5th Cir. 1983) (holding Privacy Act waives sovereign immunity for nonpecuniary damages), *and Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) (reluctantly following *Johnson* despite subsequent sovereign immunity jurisprudence).

I

"A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, *in terms of its scope*, in favor of the sovereign." *Lane*, 518 U.S. at 192, 116 S. Ct. 2092 (emphasis added) (internal citations omitted).[3] "[T]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992). "A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text. . . . " *Lane*, 518 U.S. at 192, 116 S. Ct. 2092.

A

Here, the court all but admits that the statutory term "actual damages" does not unequivocally express a waiver for nonpecuniary damages. According to our court's opinion, "there is *no ordinary or plain meaning* of the term actual damages." *Cooper*, 596 F.3d at 544 (emphasis added). Indeed, definitional analysis "*sheds little light* on the type of injury or loss Congress intended plaintiffs to be able to prove." *Id.* (emphasis added). In addition, the court concedes that two other circuits "agree[ ] that the meaning of the term actual damages

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[3] My colleague's concurrence in the denial of rehearing en banc agrees that the relevant issue is not the existence of a waiver, but the *scope* of the waiver. *See* Concurrence at 1019. However, since the meaning of the term "actual damages" is ambiguous, the court should have construed the waiver narrowly in "favor of the sovereign." *Lane*, 518 U.S. at 192, 116 S. Ct. 2092.

is *ambiguous*." *Id.* at 545 (emphasis added). It also states that "we have recognized the *shifting sense* we have attributed to the term." *Id.* (emphasis added). The term, the court concludes, is a " '*chameleon*,' as its meaning changes with the specific statute." *Id.* (emphasis added). Our court's own rationale, therefore, indicates that the statute does not waive sovereign immunity for nonpecuniary damages.

B

Notwithstanding such textual infirmities, the opinion resorts to the "clear purpose behind the [Privacy] Act" purportedly embodied in the Act's preamble, the way that Congress "signaled its intent" in the Act's recordkeeping provision, and the "presumption" that Congress intended the Act to mirror the Fair Credit Reporting Act. *Id.* at 545-48. But the proper conclusion to draw from the sources on which the court relies, if any can be drawn at all, is precisely the opposite of that drawn by the court. Assuming that recourse to a preamble is appropriate in the circumstances of this case, the Act's preamble uses the term "any damages," not the narrower term "actual damages." Privacy Act of 1974, Pub. L. No. 93-579, § 2(b)(6), 88 Stat. 1896. That the preamble differs from the operative provision indicates a *difference* in meaning, not, as the court concludes, an *equivalence* in meaning. *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983). In addition, the recordkeeping provision requires agencies to prevent "embarrassment" but, notably, does not state that such harm is compensable. 5 U.S.C. § 552a(e)(10). Finally, the court's intuiting of congressional intent from our interpretation of the term "actual damages" in the Fair Credit Reporting Act, *Cooper*, 596 F.3d at 547-

48, conflicts with the statement mere pages earlier that the meaning of the term "actual damages" varies from statute to statute. *Id.* at 545.

Although my colleague's concurrence insists that the majority opinion "correctly construed the waiver to allow the recovery of nonpecuniary damages," Concurrence at 1019, the opinion itself concedes that if the term "actual damages is susceptible of two *plausible interpretations*, then the sovereign immunity canon requires the court to construe the term narrowly in favor of the Government [and] hold[ ] that nonpecuniary damages are *not* covered." *Id.* at 549-50 (emphasis added). The language used in the preamble and recordkeeping provision, and the various ways the term is used in other statutes, make evident that it is indeed susceptible to an alternative plausible interpretation. By its own logic, the court should have construed the term narrowly.

C

But it is the court's recourse to the Privacy Act's standing provision that is the most troubling, because it conflicts with the Supreme Court's interpretation of the very provision of the Privacy Act at issue in this case. In *Doe v. Chao*, 540 U.S. 614, 124 S. Ct. 1204, 157 L. Ed. 2d 1122 (2004), the Court distinguished standing to sue under the Privacy Act (which extends to all who suffer an "adverse effect") from the right to damages. The Court stated that the term "adverse effect" has the "limited but specific function" of "identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing." *Id.* at 624, 124 S. Ct. 1204. "That is, an individual subjected to an adverse effect has injury enough to open the courthouse door,

but without more has no cause of action for damages under the Privacy Act." *Id.* at 624-25, 124 S. Ct. 1204. Here, the court jumbles the two concepts, interpreting the term "actual damages" broadly with respect to the type of damages available simply because the term "adverse effect" is interpreted broadly with respect to standing. *Cooper*, 596 F.3d at 546-47. Not appropriate, said the Supreme Court quite clearly in *Doe*. 540 U.S. at 624-25, 124 S. Ct. 1204.

II

It is apparent that this case involves an important question of federal law. "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *The Federalist No. 81*, at 548 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Sovereign immunity allows for majoritarian democracy, preventing the discouragement by courts of government action. *See* Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 Vand. L. Rev. 1529, 1540 (1992). We ignore at our peril the well-established clear statement rule for waivers of sovereign immunity, which puts Congress, not the courts, in charge.

Concern over the impact of a waiver of sovereign immunity is particularly appropriate in this case. Even the dissent in *Doe*, which sought to expand damages under the Privacy Act, admitted that by its enactment "Congress did not want to saddle the Government with disproportionate liability." *Doe*, 540 U.S. at 637, 124 S. Ct. 1204 (Ginsburg, J., dissenting). Congress was prescient. Because more and more government records are accessible online through the Internet, they are easier to share. The proliferation of electronic records raises

the stakes of a broader waiver of sovereign immunity, increasing the fiscal exposure of the United States to the tune of a $1000 minimum statutory award per claim. 5 U.S.C. § 552a(g)(4)(A). Only Congress has the keys to unlock our country's Treasury. The role of the courts is to ensure that Congress has used them in each case.

III

For these reasons, I must respectfully dissent from the order denying rehearing en banc.

OPINION

MILAN D. SMITH, JR., Circuit Judge:

The Privacy Act of 1974, 5 U.S.C. § 552a *et seq.* (the Act), prohibits federal agencies from disclosing "any record which is contained in a system of records by any means of communication to any person, or to another agency" without the consent of "the individual to whom the record pertains," unless the disclosure falls within one or more enumerated exceptions to the Act. *Id.* § 552a(b). The Act also creates a private cause of action against an agency for its wilful or intentional violation of the Act that has "an adverse effect on an individual," and allows for the recovery of "actual damages" sustained as a result of such a violation. *Id.* § 552a(g)(1)(D), (g)(4)(A).

Plaintiff Stanmore Cawthon Cooper claims to have sustained actual damages as the result of an interagency exchange of information performed as part of a joint criminal investigation by Defendants Federal Aviation Administration (FAA), Social Security Administration (SSA), and Department of Transportation (DOT) (collec-

tively, the Government). Cooper seeks actual damages for nonpecuniary injuries, such as humiliation, mental anguish, and emotional distress, as a result of the unauthorized interagency disclosure of his medical information; he does not claim any pecuniary or out-of-pocket losses.

Because Cooper seeks damages only for nonpecuniary injuries, the district court granted summary judgment to the Government, after holding that the Act allows recovery only for pecuniary damages. We hold that actual damages under the Act encompasses both pecuniary and nonpecuniary damages. We reverse and remand to the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Medical Certificates and Disability Benefits

Cooper first obtained a private pilot certificate in 1964 and has been flying airplanes intermittently ever since. To operate an aircraft lawfully, one must be issued a pilot certificate and a valid airman medical certificate. 14 C.F.R. § 61.3(a), (c). The FAA requires that a pilot periodically renew his or her medical certificate to ensure that the pilot satisfies current FAA medical requirements. *Id.* § 61.23. The medical certificate renewal application requires an applicant to disclose any illnesses, disabilities, or surgeries the applicant has had during his or her lifetime, and to identify any medications being taken at the time of application.

Cooper was diagnosed with HIV in 1985. He knew he would not qualify for a renewal of his medical certificate if he disclosed his medical condition because, at that time, the FAA did not issue medical certificates to indi-

viduals with HIV who were taking antiretroviral medications. Accordingly, Cooper grounded himself and chose not to renew his medical certificate.

In 1994, however, Cooper applied for and received a medical certificate from the FAA, but without disclosing that he had HIV or was taking antiretroviral medication. Cooper renewed his medical certificate again in 1998, 2000, 2002, and 2004, each time knowingly withholding required information about his medical condition. Cooper explains that he chose to withhold that information because of the "social stigma" associated with HIV and his sexual orientation. Cooper feared that knowledge of his status as a gay man with HIV would result in discrimination against him in employment, housing, and public accommodation. As a result, he disclosed his sexual orientation and medical condition only to close friends and family.

In August 1995, after his symptoms worsened, Cooper applied to the SSA for long-term disability benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.* Cooper disclosed his HIV status to the SSA, comfortable in his understanding that the medical information disclosed in his application would be held confidential and would only be used by the SSA for its determination of Cooper's eligibility for disability benefits. Cooper qualified for the benefits, which he received from August 1995 to August 1996.

B. Operation Safe Pilot

In 2002, the Office of the Inspector General (OIG) for the DOT and the OIG for the SSA, who are charged with investigating crimes related to their respective agencies, *see* 49 U.S.C. § 354(a) and 42 U.S.C. § 902(e), collabo-

rated to investigate a California pilot who had consulted two different sets of doctors in a scheme to obtain simultaneously medical certifications to fly from the FAA and disability benefits from the SSA. From this investigation grew "Operation Safe Pilot," a joint criminal investigation conducted by the DOT-OIG and SSA-OIG that sought to uncover efforts by medically unfit individuals to obtain FAA certifications to fly. Operation Safe Pilot was initially proposed as a nationwide endeavor, but was ultimately approved as a regional project, limited to Northern California.

In July 2002, the FAA, which is part of the DOT, provided the DOT-OIG with the names and other identifying information for active certified pilots. In November 2003, the DOT-OIG sent the SSA-OIG information relating to approximately 45,000 pilots in Northern California, consisting of the pilots' names, dates of birth, social security numbers, and genders. The SSA-OIG crosschecked the DOT-OIG's information against the information in the SSA-OIG's databases, and in March or April 2004, the SSA-OIG provided the DOT-OIG with three separate spreadsheets summarizing its analysis: (1) a spreadsheet listing the names and social security numbers for the 45,000 pilots; (2) a spreadsheet listing pilots who had received Title II benefits; and (3) a spreadsheet listing pilots who had received Title XVI benefits. SSA-OIG and DOT-OIG agents then examined the spreadsheets to identify entries suggesting fraud.

C. The Investigation and Prosecution of Cooper

Upon review of the spreadsheets, the agents identified Cooper as a person of interest because the agencies' compiled data revealed that Cooper was certified to fly

by the FAA, yet had received disability benefits from the SSA. Acting on that information, the agents acquired Cooper's medical file from the FAA, which revealed that Cooper had never disclosed his HIV to the FAA, and his disability file from the SSA, which contained information relating to Cooper's HIV.

In January 2005, the agents conducted a series of meetings with FAA Flight Surgeons to obtain their views as to whether the pilots identified by the investigation, including Cooper, had falsified their medical certificate applications and if so, whether that falsified information was material to the FAA's decision to certify the pilots. After reviewing Cooper's FAA medical file and SSA disability file, the FAA Flight Surgeons concluded that the FAA would not have issued Cooper an unrestricted medical certificate had it known of his HIV.

At that point, the agents arranged an interview with Cooper to ask him about his medical certificate applications. In March 2005, the agents met with Cooper, at which time he confessed to having intentionally withheld his medical condition from the FAA. That same month, the FAA issued an emergency order revoking Cooper's pilot certificate due to his misrepresentations to the FAA.

In August 2005, Cooper was indicted on three counts of making false statements to a government agency under 18 U.S.C. § 1001. In 2006, he pleaded guilty to one count of making and delivering a false official writing, a misdemeanor under 18 U.S.C. § 1018. He was sentenced to two years of probation and fined $1,000.

D. The District Court's Decision

In March 2007, Cooper filed a lawsuit in the Northern District of California against the Government. Cooper alleged that the FAA, DOT, and SSA willfully or intentionally violated the Act by conducting their interagency exchange of his records. He claims that this unlawful disclosure caused him "to suffer humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress."

In spring 2008, both parties moved for summary judgment. The district court concluded there was no genuine issue of material fact that the Government had failed to uphold its record-keeping obligations under the Act, but that there was a triable issue of fact as to whether the Government's violation was intentional or willful. However, because the district court found the term "actual damages" to be ambiguous, and construed the waiver of sovereign immunity strictly in favor of the Government, it ruled against Cooper, holding that due to the strictly nonpecuniary nature of his damages, there was no genuine issue of material fact as to his having suffered actual damages under the Act. The district court never reached the issue of whether the Government's failure to comply with the Act proximately caused an adverse effect on Cooper.[1]

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review a district court's grant of summary judgment

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[1] Because the district court did not rule on whether Cooper had created a genuine issue of material fact on the proximate causation element of his claim, it has discretion to decide that issue on remand.

de novo. *Vasquez v. County of Los Angeles*, 349 F.3d 634, 639 (9th Cir. 2003). Viewing the evidence in the light most favorable to Cooper, we determine "whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law." *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

III. DISCUSSION

The Act forbids federal agencies from disclosing an individual's records without that individual's written consent, unless the disclosure falls within one of the Act's narrow exceptions. 5 U.S.C. § 552a(b). Congress passed the Act "'to protect the privacy of individuals identified in information systems maintained by Federal agencies'" by regulating "'the collection, maintenance, use, and dissemination of information by such agencies.'" *Doe v. Chao*, 540 U.S. 614, 618, 124 S. Ct. 1204, 157 L. Ed. 2d 1122 (2004) (quoting Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896). To that end, the Act furnishes federal agencies with "detailed instructions for managing their records and provides for various sorts of civil relief to individuals aggrieved by failures on the Government's part to comply with the [Act's] requirements." *Id.*

If a federal agency fails to comply with the Act's record-keeping requirements, an individual may file a civil action against the agency in district court if the unauthorized disclosure has "an adverse effect" on the individual. § 552a(g)(1)(D). If the individual demonstrates "that the agency acted in a manner which was intentional or willful," the individual can recover "actual damages sustained by the individual as a result of the"

agency's violation of the Act, "but in no case shall a person entitled to recovery receive less than the sum of $1,000." § 552a(g)(4)(A). Thus, to prevail on a claim under the Act, a plaintiff must prove that: (1) the government agency failed to uphold its record-keeping obligation; (2) the agency acted intentionally or willfully in failing to execute its responsibility; (3) the failure proximately caused an adverse effect on the plaintiff; and (4) the plaintiff sustained actual damages. *Rose v. United States*, 905 F.2d 1257, 1259 (9th Cir. 1990).

In light of the ruling of the district court, the sole issue before us on appeal is the meaning of "actual damages" as used in the Act. The Supreme Court has not expressly addressed the issue. In *Doe v. Chao*, the Court held that the Act requires proof of "some actual damages" to recover the Act's minimum statutory damages of $1,000. 540 U.S. at 627, 124 S. Ct. 1204. But the Court did not address "the precise definition of actual damages," though it recognized the disparate views of Courts of Appeals on the question. *Id.* at 627 n.12, 124 S. Ct. 1204.

In *Fitzpatrick v. IRS*, the Eleventh Circuit held that actual damages "permits recovery only for proven pecuniary losses and not for generalized mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries." 665 F.2d 327, 331 (11th Cir. 1982), *abrogated on other grounds by Doe*, 540 U.S. at 618, 124 S. Ct. 1204; *see also Hudson v. Reno*, 130 F.3d 1193, 1207 (6th Cir. 1997) (adopting the Eleventh Circuit's position), *abrogated on other grounds by Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848, 121 S. Ct. 1946, 150 L. Ed. 2d 62 (2001). In *Johnson v. IRS*, the Fifth Circuit reached the opposite conclusion, holding that

"the term 'actual damages' under the Act does indeed include damages for physical and mental injury for which there is competent evidence in the record." 700 F.2d 971, 972 (5th Cir. 1983), *abrogated on other grounds by Doe*, 540 U.S. at 618, 124 S. Ct. 1204.

Unlike the Fifth, Sixth, and Eleventh Circuits, we have not previously decided the meaning of actual damages under the Act. *See Rouse v. U.S. Dep't. of State*, 567 F.3d 408, 418 n.8 (9th Cir. 2009).

A. Intrinsic Sources

Declaring the meaning of actual damages is a matter of statutory interpretation. "The purpose of statutory construction is to discern the intent of Congress in enacting a particular statute." *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999).

Our search for Congress's intent begins with "the plain meaning of the language in question." *United States v. 144,774 pounds of Blue King Crab*, 410 F.3d 1131, 1134 (9th Cir. 2005). If the relevant language is plain and unambiguous, our task is complete. *See United States v. Carter*, 421 F.3d 909, 911 (9th Cir. 2005). To discern the text's plain meaning, "words will be interpreted as taking their ordinary, contemporary, common meaning." *Id.* (internal quotation marks omitted).

Unfortunately, there is no ordinary or plain meaning of the term actual damages because it is a legal term of art. As a result, ordinary dictionaries are of no assistance in clarifying the plain meaning of the term. *See Johnson v. Aljian*, 490 F.3d 778, 780 (9th Cir. 2007) ("[W]e follow the common practice of consulting dictionary definitions to clarify their ordinary meaning[ ] and

look to how the terms were defined at the time [the statute] was adopted." (internal quotation marks omitted) (alterations in original)). Neither the *American Heritage Dictionary of English Language* nor *Webster's Third New International Dictionary* contains an entry for actual damages. *See generally American Heritage Dictionary of the English Language* (4th ed. 2000); *Webster's Third New International Dictionary* (2002).

Black's Law Dictionary defines "actual damages" as "[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses." *Black's Law Dictionary* 445 (9th ed. 2009). Unfortunately, that definition sheds little light on the type of injury or loss Congress intended plaintiffs to be able to prove under the Act. Simply because a statute authorizes the recovery of damages to compensate for injuries does not mean that the statute authorizes the recovery of damages for *any* type of loss. *See, e.g.*, *Naton v. Bank of Cal.*, 649 F.2d 691, 699 (9th Cir. 1981) (holding that pain and suffering damages are not allowed under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*); *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460, 464 (9th Cir. 1977) (holding that actual damages for federal claims under the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, are limited to economic loss).

The Eleventh and Fifth Circuits, in *Fitzpatrick* and *Johnson*, agreed that the meaning of the term actual damages is ambiguous. In *Fitzpatrick*, the Eleventh Circuit concluded there is "no consistent legal interpretation" of actual damages, and observed that "courts have used 'actual damages' in a variety of circumstances, with the interpretation varying with the context of use."

665 F.2d at 329. In *Johnson*, the Fifth Circuit concluded that "the term 'actual damages' has no plain meaning or consistent legal interpretation." 700 F.2d at 974. Similarly, we have recognized the shifting sense we have attributed to the term. *In re Dawson*, 390 F.3d 1139, 1146 n.3 (9th Cir. 2004). The term is "chameleon," as its meaning changes with the specific statute in which it is found. *See Kucana v. Holder*, ___ U.S. ___, 130 S. Ct. 827, 835, ___ L. Ed. 2d ___ (2010).

Since there is no plain meaning to the term actual damages, as used in the Act, we next consult the term in its statutory context, looking to the language of the entire statute, its structure, and purpose. *See Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006) ("[I]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." (internal quotation marks omitted)); *see also Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486, 126 S. Ct. 1252, 163 L. Ed. 2d 1079 (2006) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

Congress articulated a clear purpose behind the Act, stating that "the right to privacy is a personal and fundamental right protected by the Constitution of the United States." Pub. L. No. 93-579, § 2(a)(4), 88 Stat. 1896. To protect that right, Congress passed the Act "to provide certain safeguards for an individual against an invasion of personal privacy by requiring federal agen-

cies . . . to . . . be subject to civil suit for *any damages* which occur as a result of willful or intentional action which violates any individual's rights under this Act." *Id.* § 2(b)(6) (emphasis added).

Congress's intent that the Act offer relief in the form of "any damages" resulting from a violation of one's right of privacy begs the question of what types of injuries typically result from the violation of such a right. The Supreme Court has observed that "[i]n the 'right of privacy' cases the primary damage is the mental distress from having been exposed to public view." *Time, Inc. v. Hill*, 385 U.S. 374, 386 n.9, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967); *see also Restatement (Second) of Torts* § 652H(b) (1977) ("One who has established a cause of action for invasion of his privacy is entitled to recover damages for . . . his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion. . . . "). The related common-law tort of defamation also provides monetary relief for nonpecuniary harms. In defamation cases, the Supreme Court has stated that "the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). Accordingly, in her dissent in *Doe v. Chao*, Justice Ginsburg, commenting on the Act's purpose of providing relief for "any damages," stated "Act violations commonly cause fear, anxiety, or other emotional distress—in the Act's parlance, 'adverse effects[,]'" and that in such cases, "emotional distress is generally the only harm the claimant suffers." 540 U.S. at 634, 124 S. Ct. 1204 (Ginsburg, J., dissenting). One can readily envision circumstances in which these types

of injuries might flow from the disclosure of one's confidential medical records, which often contain some of the most sensitive and intimate information about one's physical, mental, and emotional well-being, and sexual orientation. Given the nature of the injuries that most frequently flow from privacy violations, it is difficult to see how Congress's stated goal of subjecting federal agencies to civil suit for *any damages* resulting from a willful or intentional violation of the Act could be fully realized unless the Act encompasses both pecuniary and nonpecuniary injuries.

Congress signaled its intent, throughout the Act, to extend monetary recovery beyond pure economic loss. The Act obligates agencies to maintain a records system that "shall . . . establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, *embarrassment*, inconvenience, or unfairness to any individual on whom information is maintained." 5 U.S.C. § 552a(e)(10) (emphasis added). Further, the Act provides a civil remedy for an agency's failure "to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the . . . *character* . . . of . . . the individual that may be made on the basis of such record." *Id.* § 552a(g)(1)(C) (emphasis added). Congress's use of language to ensure that a federal agency's record-keeping practices do not result in embarrassment or harm to one's character bolsters a construction of actual damages that reaches nonpecuniary damages.

Further, a contrary reading of the Act seems unreasonable in light of how we and other courts have construed the term "adverse effect." The Act provides actual damages for intentional or wilful violations that have an adverse effect on an individual. Our circuit and at least seven others have recognized that a nonpecuniary harm, such as emotional distress, may constitute an adverse effect under the Act. *See Orekoya v. Mooney*, 330 F.3d 1, 7-8 (1st Cir. 2003) (holding that "provable emotional distress may constitute an adverse effect"), *abrogated on other grounds by Doe*, 540 U.S. at 618, 124 S. Ct. 1204; *Doe v. Chao*, 306 F.3d 170, 181 n.6 (4th Cir. 2002); *Quinn v. Stone*, 978 F.2d 126, 135-36 (3d Cir. 1992) (holding that stress and emotional anguish can constitute adverse effects); *Englerius v. Veterans Admin.*, 837 F.2d 895, 897 (9th Cir. 1988) (agreeing with the D.C. Circuit and Tenth Circuit that "emotional trauma" can constitute an adverse effect); *Albright v. United States*, 732 F.2d 181, 186 (D.C. Cir. 1984) ("emotional trauma alone is sufficient to qualify as an 'adverse effect' under Section 552a(g)(1)(D) of the Act"); *Johnson*, 700 F.2d at 976-77; *Parks v. IRS*, 618 F.2d 677, 683 (10th Cir. 1980) (holding that "mental distress or embarrassment" could constitute an adverse effect). Even the Eleventh Circuit acknowledged in *Fitzpatrick* that humiliation or an emotional injury can qualify as an adverse effect. 665 F.2d at 331 & n.7. To recognize that the Act entitles one to actual damages for an adverse effect related to one's mental or emotional well-being, or one's character, as we and other circuits have previously done, while holding that one injured under the Act cannot recover actual damages for nonpecuniary injuries, would be an unreasonable construction of the Act. Indeed, such a reading would essentially render the provi-

sion of actual damages meaningless in cases where the plaintiff's injury relates to his or her character, or mental or emotional health, even though such cases are common under the Act. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)).

B. Extrinsic Sources

The parties in this case have argued at length about how the Act's legislative history supports their respective positions on the meaning of actual damages.

The statutory text itself is the "authoritative statement" of a statute's meaning. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005). However, courts can and do consult extrinsic materials, such as legislative history, for guidance in construing an ambiguous statute. *See Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5, 111 S. Ct. 2281, 115 L. Ed. 2d 207 (1991) ("[W]e repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous[.]"). But courts resort to extrinsic materials "only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp.*, 545 U.S. at 568, 125 S. Ct. 2611.

In this case, the Act's legislative history is not a reliable source for the meaning of actual damages because both sides of the argument can readily find support for

their respective positions in that history. Accordingly, it is not surprising that in *Fitzpatrick* and *Johnson*, the Eleventh and Fifth Circuits conducted their own thorough reviews of the legislative history of the Act, only to arrive at diametrically opposing constructions of the same term. For these reasons, we decline to wade through the "murky, ambiguous, and contradictory" legislative history of the Act in the vain hope of finding clear guidance concerning the meaning of the term "actual damages." *Id.*

Moreover, legislative history is of no help to us in construing the scope of the Government's waiver of sovereign immunity at issue in this case, *see infra* Part III.C, because "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992).

However, one extrinsic source that does shed some reliable light on the meaning of the term actual damages in the Act is the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.* In 1970, only four years before Congress passed the Act, Congress enacted the FCRA with the express purpose of requiring

> consumer reporting agencies [to] adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C. § 1681(b).

In enacting the FCRA, Congress recognized that this country's banking system has produced a complex system of credit reporting, involving consumer reporting agencies gathering and evaluating a wide range of personal and sensitive information, such as "credit worthiness, credit standing, credit capacity, character, and general reputation of consumers." *Id.* § 1681(a)(2). Congress passed the FCRA to ensure that "consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's *right to privacy*." *Id.* § 1681(a)(4) (emphasis added); *see also Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007) ("Congress enacted the FCRA in 1970 to . . . protect consumer privacy."). To that end, the FCRA prohibits credit reporting agencies from releasing consumer credit reports except as provided under 15 U.S.C. § 1681b(a).

Thus, not only did Congress enact the Act and the FCRA within a few years of each other, but they were passed to address an identical concern growing out of closely analogous circumstances. In both cases, Congress acknowledged that vast databases of personal information are being gathered by agencies—in one case, federal agencies, and in the other, credit reporting agencies—and sought to circumscribe these agencies in the manner they gather, maintain, and use that sensitive information. Ultimately, Congress passed both laws with the purpose of protecting an individual's right of privacy from being violated by the disclosure of private information.

Further, the Act and the FCRA provide similar remedies. The FCRA creates a private right of action for injured consumers to recover any "*actual damages*" caused by an agency's negligent or willful violation of the FCRA. *See* 15 U.S.C. §§ 1681n, 1681o (emphasis added). Most importantly, we have held that actual damages under the FCRA encompass damages for emotional distress. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1332-33 (9th Cir. 1995). Other courts have held similarly. *See, e.g., Sloane v. Equifax Info. Servs.*, 510 F.3d 495, 500 (4th Cir. 2007); *Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469, 474 (2d Cir. 1995); *Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509, 513 (5th Cir. 1982).

"[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005) (plurality opinion); *see also United States v. Novak*, 476 F.3d 1041, 1051 (9th Cir. 2007) (en banc) ("Moreover, courts generally interpret similar language in different statutes in a like manner when the two statutes address a similar subject matter."). The presumption is appropriate in this case. Therefore, our construction of the identical language in the FCRA, a statute closely analogous in purpose and time as the Act, is a reliable extrinsic source that buttresses a construction of the Act to mean that actual damages encompass both pecuniary and nonpecuniary damages.[2]

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[2] There are other federal statutes that allow for the recovery of actual damages, which courts have construed as including nonpecuniary

Having reviewed the text, purpose, and structure of the Act, as well as how actual damages has been construed in other closely analogous federal statutes, we hold that Congress intended the term actual damages in the Act to encompass both pecuniary *and* nonpecuniary injuries.

C. Sovereign Immunity Canon

The district court held that the term actual damages is ambiguous and, consequently, applied the sovereign immunity canon in the Government's favor, construing actual damages narrowly to encompass only pecuniary damages. Our finding of clear congressional intent in the statute itself—its purpose, structure, and language—and external support in the language and construction of the FCRA mandates reversal of the district court's decision.

The sovereign immunity canon holds that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996). To the extent there are any ambiguities in the statutory text, those ambiguities must be strictly construed in favor of the sovereign. *Id.* Therefore, "[t]o

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damages, but we do not find those statutes to be as analogous in time, purpose, and subject matter to the Act. *See, e.g., Anderson v. United Finance Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982) (holding that "actual damages" under the Equal Credit Opportunity Act, 15 U.S.C. § 1691e, may include "injury to credit reputation, and mental anguish, humiliation or embarrassment"); *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119, 1121 (7th Cir. 1974) (holding that "actual damages" under the Fair Housing Act, 42 U.S.C. § 3612(c), may include damages for emotional distress and humiliation).

sustain a claim that the Government is liable for awards of [nonpecuniary] monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Id.*

Cooper argues that the canon applies only where the initial waiver of immunity is in question. Because the Act expressly authorizes a private cause of action against the Government for damages, Cooper contends that the canon is of no use in construing the meaning of actual damages.

Cooper's position is not supported by applicable case law. In *United States v. Nordic Village, Inc.*, the Court applied the sovereign immunity canon to hold that 11 U.S.C. § 106(c) does not waive the federal government's sovereign immunity from an action seeking monetary recovery in bankruptcy. 503 U.S. at 33-39, 112 S. Ct. 1011. The Court acknowledged that § 106(c)'s companion provisions, § 106(a) and § 106(b), plainly waive immunity with regard to monetary relief, and that § 106(c) waives immunity as to some form of relief (e.g., declaratory relief). *Id.* at 34, 112 S. Ct. 1011. Despite the waiver, the Court did not limit its application of the sovereign immunity canon; it proceeded to analyze the canon as to the scope of the waiver. Because the language of § 106(c) was "susceptible of at least two interpretations that do *not* authorize monetary relief," the Court applied the canon to hold that § 106(c) "fails to establish unambiguously that the waiver extends to monetary claims," and ruled in the government's favor. *Id.* Thus, the sovereign immunity canon remains relevant and applicable beyond the initial waiver of sovereign immunity for purposes of gauging the scope of the waiver. *See Lane*, 518 U.S. at 192, 116 S. Ct. 2092 ("[A]

waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.").

Applying the canon to this case, if actual damages is susceptible of two plausible interpretations, then the sovereign immunity canon requires the court to construe the term narrowly in favor of the Government, holding that nonpecuniary damages are not covered. *See Siddiqui v. United States*, 359 F.3d 1200, 1203-04 (9th Cir. 2004) (applying the sovereign immunity canon in the government's favor because both parties had proposed conflicting yet plausible constructions of the disputed statutory provision). For the reasons explained above in Part III.A-B, we conclude that when read in connection with the text of the entire Act, the Act's remedial scheme, and its underlying purpose of providing relief for "any damages" resulting from a violation of the privacy interests protected by the Act, the term actual damages is unambiguous. Given Congress's clear intent to furnish monetary relief for some injuries that are nonpecuniary in nature, and are proximately caused by an agency's wilful or intentional violation of the Act, we do not deem a construction that limits recovery to pecuniary loss plausible. *United States v. Williams*, 514 U.S. 527, 541, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995) (Scalia, J., concurring) ("the rule requiring clear statement of waivers of sovereign immunity. . . . does not, however, require explicit waivers to be given a meaning that is implausible" (internal citation omitted)).

The district court erred by failing to consider the full panoply of sources available to it for evaluating the scope of the Government's waiver of sovereign immunity under the Act. Rather, the district court relied on the

sovereign immunity canon alone, to the exclusion of the traditional tools of statutory construction. "The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 128 S. Ct. 2007, 2019, 170 L. Ed. 2d 960 (2008); *accord Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001) (noting that "canons are not mandatory rules" but guides "designed to help judges determine the Legislature's intent," and that "other circumstances evidencing congressional intent can overcome their force").

Moreover, the scope of a waiver of sovereign immunity can be ascertained only by reference to the congressional policy underlying the statute. *United States v. Oregon*, 44 F.3d 758, 766 (9th Cir. 1994) (citing *Franchise Tax Bd. v. U.S. Postal Serv.*, 467 U.S. 512, 521, 104 S. Ct. 2549, 81 L. Ed. 2d 446 (1984)); *see also Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 921-23 (9th Cir. 1995) (reversing the district court's holding that the Settlement Act did not waive sovereign immunity as to prejudgment interest, concluding that the district court improperly applied the sovereign immunity canon by not looking to congressional purpose underlying the Settlement Act).

Congress enacted the Act to secure a citizen's "right to privacy [, which] is a personal and fundamental right protected by the Constitution of the United States." Pub. L. No. 93-579, § 2(A)(4). "Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." *Carey v. Piphus*, 435 U.S. 247, 254, 98 S. Ct. 1042, 55 L.

Ed. 2d 252 (1978). In connection with compensating constitutional injuries under 42 U.S.C. § 1983, another federal statute that seeks to provide compensation for injuries resulting from government misconduct, *see Carey*, 435 U.S. at 255-56, 98 S. Ct. 1042, the Supreme Court has stated, "to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question," *id.* at 258-59, 98 S. Ct. 1042. Similarly, to achieve the policy underlying the Act, the privacy right should be tailored to the particular interests implicated by the Act. Those interests will, in most cases, result in injuries that go beyond mere financial loss (e.g., embarrassment, mental anguish, emotional distress). In light of the inherently noneconomic interests central to the Act, we cannot plausibly construe actual damages under the Act to exclude nonpecuniary damages.[3]

IV. CONCLUSION

Applying traditional tools of statutory interpretation, we hold that in using the term actual damages, Congress

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[3] The Government argues that even if actual damages include nonpecuniary injuries, we should affirm the district court based upon the insufficiency of Cooper's evidence regarding his nonpecuniary injuries. The district court, however, made no findings of fact as to the sufficiency of Cooper's evidence of nonpecuniary injuries. Accordingly, while we do not reach the issue of what type or amount of evidence Cooper must introduce into evidence to prove that he has sustained nonpecuniary damages under the Act, on remand, the district court has discretion to entertain motions from the parties regarding whether Cooper has proffered sufficient evidence of his nonpecuniary injuries to prove actual damages under the Act, and if so, to determine the proper amount of those damages.

clearly intended that when a federal agency intentionally or willfully fails to uphold its record-keeping obligations under the Act, and that failure proximately causes an adverse effect on the plaintiff, the plaintiff is entitled to recover for both pecuniary and nonpecuniary injuries. As a result, we reverse and remand to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 07-1383 VRW

STANMORE CAWTHON COOPER, PLAINTIFF

v.

FEDERAL AVIATION ADMINISTRATION, SOCIAL SECURITY ADMINISTRATION AND UNITED STATES DEPARTMENT OF TRANSPORTATION, DEFENDANTS

ORDER

A good many laudable public policies collide in the facts at bar. These include policies to ensure the safety of the nation's airways, to root out waste, fraud and abuse in the Social Security system and to secure personal privacy of citizens with a leitmotif of policies against discrimination. None of these policies decides this case. Rather, the court is constrained to apply the express language of the statute under which plaintiff proceeds as interpreted by the Supreme Court.

Stanmore Cawthon Cooper alleges violations of the Privacy Act, 5 USC § 552a, in an amended complaint filed on July 10, 2007. Doc #26. On April 28, 2008, Cooper moved for partial summary judgment on liability, Doc #66, and on May 1, 2008, defendants Federal Aviation Administration ("FAA"), Social Security Adminis-

tration ("FAA") and United States Department of Transportation ("DOT") moved for summary judgment contending that they had no liability to Cooper. Doc #100. For the reasons discussed below, the court agrees with the defendants that Cooper's motion for partial summary judgment must be DENIED, and their motion for summary judgment is GRANTED.

I

The following facts are not disputed. To operate an aircraft legally, an individual needs a valid airman medical certificate in addition to a pilot certificate. See 14 CFR § 61.3. To obtain a medical airman certificate, an individual must complete FAA Form 8500-8, "Application for an Airman Medical Certificate." Doc #106 at 3, Griswold Decl at ¶6.

Cooper first obtained a pilot's license in 1964. Doc #101-2 at 7, Wang Decl, Ex 1, Cooper Dep at 25:2-4. In 1985, Cooper learned that he was HIV-positive. Doc #101-2 at 3, Wang Decl, Ex 1, Cooper Dep at 19:22-23. Even before that, around 1981, Cooper stopped renewing his medical certificate, because he suspected he might be HIV-positive. Doc #101-2 at 8-9, Wang Decl, Ex 1, Cooper Dep at 30:3-31:13.

Cooper began receiving SSA disability benefits in 1996 due to severe symptoms of HIV infection. Doc #101-2 at 4-5, Wang Decl, Ex 1, Cooper Dep at 20:8-20, 22:8-22. A copy of Cooper's January 30, 1996 application for disability benefits appears in the record at Doc #114-2 at 2-9, Wood Opp Decl, Ex 1. Within several months, Cooper's health improved and he discontinued his disability benefits. Doc #101-2 at 6, Wang Decl, Ex 1, Cooper Dep at 23:6-22.

In 1998, Cooper applied for and obtained a new airman medical certificate, but did so without disclosing his HIV status on the application. Doc #91 at 4-5, Cooper Decl at ¶12. Cooper applied to renew his medical certificate in 2000, 2002 and 2004, again omitting from the applications his HIV status and required information about medications he was taking. Doc #101-2 at 11-12, Wang Decl, Ex 1, Cooper Dep at 33:24-34:12. Copies of the 8500-8 forms for these years appear in the record at Doc #101-5 at 2-17, Wang Decl, Ex 16.

On August 6, 2002, the DOT Office of Inspector General ("DOT-OIG") proposed a joint investigation, known as Operation Safe Pilot ("OSP"), to the SSA Office of Inspector General ("SSA-OIG"). See Doc #102-2 at 2, Stickley Decl, Ex 1 at SSAIG00021(memorandum proposing OSP). The idea for the investigation came from a 2002 joint investigation of a pilot who had used different doctors to certify medical fitness to fly and to obtain disability benefits. That investigation raised safety concerns within the DOT-OIG that such deception could allow medically unfit pilots to evade detection and endanger the public. Doc #103 at 2, Jackson Decl at ¶4.

According to the proposal, the investigation would involve cross-referencing active pilots' social security numbers against databases of SSA disability income and supplemental security income beneficiaries. Doc #102-2 at 2, Stickley Decl, Ex 1 at SSAIG00021. The comparison of data between the agencies was intended to uncover various types of fraud against both agencies:

- Pilots that have submitted false or fraudulent SSNs to the FAA in order to gain a pilot's license.

- Pilots that have altered their name in order to obtain a pilot's license.

- *Pilots that are claiming a debilitating condition with the SSA and claim good health to obtain a FAA medical certificate.*

- Pilots that have criminal histories which prohibit them from maintaining a pilot's license.

- Pilots that have stolen someone's identity "identity theft" [sic].

- Possible drug smuggling, or pilots that are conducting illegal activity.

Doc #102-2 at 2, Stickley Decl, Ex 1 at SSAIG00021 (emphasis added).

Although initially proposed as a nationwide project, it was approved by DOT-OIG and SSA-OIG as a regional project, limited to northern California. Doc #103 at 2, Jackson Decl at ¶5; Doc #102 at 2, Stickley Decl at ¶4.

Both DOT-OIG and SSA-OIG considered Privacy Act implications of OSP to some degree. Hank Smedley, DOT-OIG Special Agent in Charge for the region that includes northern California, Doc #103 at 2, Jackson Decl at ¶2, discussed the Privacy Act with his colleagues and reviewed the Privacy Act and DOT routine use exceptions to the Privacy Act that DOT argues permitted disclosures of information during OSP. Doc #101-3 at 32-37, Wang Decl, Ex 6, Smedley Dep at 52:24-53:25, 55:20-56:13, 59:23-60:13. Similarly, SSA-OIG created a set of guidelines for the investigation that it believed would insure the investigation "does not run afoul of the Privacy Act." Doc #102-2 at 8, Stickley Decl, Ex 2; see

also Doc #102 at 2, Stickley Decl at ¶5. The SSA-OIG recommended that:

> (1) the run be conducted in house;
>
> (2) that we're dealing with DOT-OIG (as opposed to the FAA) and as such are comfortable with their "enforcement" powers;
>
> (3) with respect to SSN misuse, we share information with DOT-OIG only once we open a case, and we have an AUSA considering SSN charges;
>
> (4) with respect to disability fraud, we only share information with DOT-OIG once we've got a basis for opening a case, *and* we've got an AUSA willing to consider SSA charges';
>
> and (5) we're not using tax return information in the process.

Doc #102-2 at 8, Stickley Decl, Ex 2.

On or about July 22, 2005, DOT-OIG Special Agent Stephen Jackson requested the names, dates of birth, social security numbers and other identifying information about active certified pilots from the FAA. Doc #105 at 2, Smith Decl at ¶4; Doc #103 at 3, Jackson Decl at ¶7. The FAA produced a CD containing the requested information and sent it to DOT-OIG Agent Jackson. Doc #105 at 2, Smith Decl at ¶4.

With the approval of DOT-OIG Special Agent in Charge Smedley, DOT-OIG Agent Jackson sent the names, social security numbers, dates of birth and gender of approximately 45,000 pilots in northern California to SSA-OIG Special Agent Sandra Johnson on or about November 21, 2003. Doc #103 at 3, Jackson Decl at ¶8.

This data was then compared against SSA-OIG records by SSA-OIG employee Paul Schmidt. Doc #101-3 at 44-48, Wang Decl, Ex 7, Johnson Dep at 87:23-91:23.

Around March or April 2004, SSA-OIG Agent Johnson provided DOT-OIG Agent Jackson with three spreadsheets representing SSA-OIG's comparison of the pilot data provided to it by DOT-OIG with the SSA-OIG's records: one spreadsheet compared name and social security number information, another listed active pilots who had received Title II benefits and a third listed active pilots who had received Title XVI benefits. Doc #103 at 3, Jackson Decl at ¶9.

Around May 2004 - after providing the results of the data analysis to DOT-OIG - SSA-OIG Agent Johnson opened an investigative file for OSP, assigned the case to SSA-OIG Agent Robb Stickley and ceased work on the investigation. Doc #101-3 at 17-19, Wang Decl, Ex 5, Lasher Dep at 88:21-89:12, 90:9-19; Doc #101-3 at 41, 53, Wang Decl, Ex 7, Johnson Dep at 21:19-24, 138:8-17; Doc #102 at 2, Stickley Decl at ¶3.

SSA-OIG Agent Stickley and DOT-OIG Agent Jackson separately examined the spreadsheets for entries that suggested fraud. Doc #102 at 3-4, Stickley Decl at ¶10; Doc #103 at 4, Jackson Decl at ¶12. They created individual lists of individuals that they believed merited further investigation. Doc #102 at 4, Stickley Decl at ¶11; Doc #103 at 4, Jackson Decl at ¶12. Cooper was flagged on SSA-OIG Agent Stickley's list because he was a pilot who had received Title II disability benefits but had certified his fitness to fly. Doc #102 at 3-4, Stickley Decl at ¶¶10-11.

Around October 2004, SSA-OIG Agent Stickley requested Cooper's disability file from the SSA. Doc #102 at 4, Stickley Decl at ¶12. Around October 26, 2004, after a meeting with SSA-OIG Agent Stickley in which the agents concluded that Cooper merited further investigation, DOT-OIG Agent Jackson requested from the FAA a certified or "blue ribbon" copy of Cooper's medical file. Doc #103 at 4, Jackson Decl at ¶¶12-13. SSA-OIG Agent Stickley and DOT-OIG Agent Jackson reviewed Cooper's FFA and SSA records together and discovered that Cooper did not reveal his HIV infection on his FAA medical certificate applications. Doc #103 at 4, Stickley Decl at ¶13.

DOT-OIG Agent Jackson and SSA-OIG Agent Stickley met with FAA flight surgeons in January 2005 to determine whether Cooper and others had falsified their FAA medical certificate applications and, if so, whether the falsifications were material to the certification decision. Doc #103 at 5, Jackson Decl at ¶¶14, 16. Dr Goodman, an FAA flight surgeon, reviewed Cooper's FAA and SSA records and concluded that had the FAA known of Cooper's preexisting HIV infection when he applied for his airman medical certificates in 2000, 2002 and 2004, the FAA would not have issued Cooper's unrestricted medical certificates. Doc #103 at 5, Jackson Decl at ¶¶16-17.

On or about March 22, 2005, the FAA issued an emergency order revoking Cooper's pilot certificate. Doc #101-4 at 26-31, Wang Decl, Ex 14 at FAA00173-FAA00178.

On March 23, 2005, DOT-OIG Special Agent Lisa Glazzy and DOT-OIG Agent Jackson interviewed Coo-

per at a Starbucks coffee shop at the airport in Hayward, California. Doc #103 at 6, Jackson Decl at ¶19. At the interview, Cooper admitted that he had intentionally failed to report his HIV infection and medical conditions associated with his HIV infection on his FAA airman medical certificate applications in 2000, 2002 and 2004. Doc #103 at 6, Jackson Decl at ¶19.

On August 30, 2005, Cooper was indicted on three counts of making false statements to a government agency in violation of 18 USC § 1001. See Doc #4 in case no 05-cr-0549-VRW-1. On March 13, 2006, judgment was entered against Cooper. See Doc #37 in case no 05-cr-0549-VRW-1. Cooper pleaded guilty to one count of making and delivering a false official writing, a misdemeanor under 18 USC § 1018. Doc #37 in case no 05-cr-0549-VRW-1 at 1. Cooper was sentenced to two years of probation, a fine of $1,000 and a special assessment of $25. Doc #37 in case no 05-cr-0549-VRW-1 at 2, 4.

II

A

"Once a properly documented motion has engaged the gears of Rule 56, the party to whom the motion is directed can shut down the machinery only by showing that a trialworthy issue exists." *McCarthy v Northwest Airlines*, 56 F3d 313, 315 (1st Cir 1995). That is, the court must determine whether genuine issues of material fact exist, resolving any doubt in favor of the party opposing the motion. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v Liberty Lobby, Inc*, 477 US 242, 248 (1986). Further, "summary judgment will not lie if the

dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 US at 248. And the burden of establishing the absence of a genuine issue of material fact lies with the moving party. *Celotex Corp v Catrett*, 477 US 317, 322-23 (1986). Summary judgment is granted only if the moving party is entitled to judgment as a matter of law. FRCP 56(c).

The nonmoving party may not simply rely on the pleadings, however, but must produce significant probative evidence, by affidavit or as otherwise provided in FRCP 56, supporting its claim that a genuine issue of material fact exists. *TW Elec Serv, Inc v Pacific Elec Contractors Ass'n*, 809 F2d 626, 630 (9th Cir 1987). Summary judgment is appropriate when the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex* at 322. The evidence presented by the nonmoving party "is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 US at 255. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 US at 249.

B

The Privacy Act, 5 USC § 552a, provides in relevant part that:

> (b) No agency shall disclose any record which is contained in a system of records by any means of communication to any other person, or to another agency, except pursuant to a written request by, or with

> the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—
>
> (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section; * * * .

5 USC § 552a(b)(3).

"Routine use" means "the use of * * * a [disclosed] record for a purpose which is compatible with the purpose for which it was collected." 5 USC § 552a(a)(7). The statute requires that "each routine use of the records contained in the system, including the categories of users and the purpose of such use" be published in the Federal Register at least annually as part of "a notice of the existence and character of the system of records * * * ." 5 USC § 552a(e)(4)(D).

In addition, the statute requires that each agency maintaining record systems:

> (3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—
>
> (C) the routine uses which may be made of this information as published pursuant to paragraph (4)(D) of this subsection; * * * .

5 USC § 552a(e)(3)(C).

Thus, disclosure of a record from one agency to another does not satisfy the routine use exception to 5 USC § 552a(b) unless the government shows that (1) disclosure of the record is within the scope of an

agency's routine use regulations as published in the Federal Register and (2) disclosure of the record is for a purpose which is compatible with the purpose for which the record was collected. See *Covert v Harrington*, 876 F2d 751, 754 (9th Cir 1989). Assessing compatibility requires a "dual inquiry into the purpose for the collection of the record in the specific case and the purpose of the disclosure." *Britt v Naval Investigative Serv*, 886 F2d 544, 548-9 (3d Cir 1989).

The government must also comply with the independent requirement of 5 USC § 552a(e)(3)(C) that an agency collecting information shall inform individuals who supply information on the form used to collect the information or on a separate form that can be retained by the individual of the routine uses that may be made of the information. *Covert*, 876 F2d at 755.

A civil cause of action for violations of 5 USC § 552a(b) is created by 5 USC § 552a(g)(1)(D). See *Doe v Chao*, 540 US 614, 618 (2004). That provision states:

> Whenever any agency
>
> * * *
>
> (D) fails to comply with any other provision of this section, or any rule promulgated thereunder, *in such a way as to have an adverse effect on an individual*, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

5 USC § 552a(g)(1)(D) (emphasis added)

The statute further provides that:

> In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
>
> (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 USC § 552a(g)(4).

The Supreme Court has held that *actual damages* are a required element of claims, like Cooper's, that are brought pursuant to 5 USC § 552a(g)(D). *Chao*, 540 US at 617-18. The Court did not, however, reach the issue whether non-pecuniary harm, such as emotional distress, qualifies as *actual damages*. *Chao*, 540 US at 622 n5.

Thus, to prove his claim, Cooper must establish that the disclosures were illegal under 5 USC § 552a(b), that the illegal disclosure was intentional or willful and that he suffered an adverse effect and actual damages as a result of the disclosures. Although the court's decision turns on Cooper's failure to raise an issue of actual damages as it appears the Supreme Court interprets that term in the context of section 522a(b), the court will review the other liability factors in the event of an appeal

and the appellate court's interpretation of section 522a(b) contrary to that of this court.

III

Cooper argues that the undisputed facts satisfy the elements of a Privacy Act claim under 5 USC § 552a(g)(1)(D); defendants argue that none has been satisfied.

A

As the recital of the facts above indicates, the government does not dispute that records pertaining to Cooper were transferred between agencies without the prior written consent of Cooper. Accordingly, under the plain language of 5 USC § 552a(b), the disclosures were illegal unless they fell within one of the exceptions enumerated within § 552a(b).

In its motion for summary judgment, the government devotes time to defending the intra-agency sharing of records between the FAA and DOT-OIG and the disclosure occasioned by the FAA's emergency revocation order. Doc #100 at 18-20. Cooper argues, and the court agrees, that these inquiries "miss the core Privacy Act issue in this case," Doc #113 at 4:

> That core issue is straightforward: may the [SSA], after collecting private information for ostensible purposes that have nothing to do with verifying one's capacity to fly, offer those records wholesale to a [DOT] agent, without even receiving a written request from the Head of the DOT for the records. Likewise, may the DOT, after collecting private information for ostensible purposes that have nothing to do with verifying one's eligibility for disability

> benefits, provide those records wholesale to a SSA agent without receiving a written request for the records from the Head of SSA?

Doc #113 at 4.

The central issues are whether the DOT-OIG and the SSA-OIG violated the Privacy Act when they shared records with each other. The government asserts that the transfers between the agencies were permissible under the "routine use" exception to the Privacy Act. Doc #100 at 21-24.

1

The court turns first to DOT-OIG's disclosure of the name, social security number, date of birth and gender of Cooper to SSA-OIG Special Agent Sandra Johnson on or about November 21, 2003. The forms on which this information was submitted by Cooper to the FAA appear in the record at Doc #101-5 at 2-17, Ex 16.

Cooper argues that the notice provided was inadequate, Doc #100 at 19-22, 21 n82, but the evidence of notice that Cooper cites—a blank FAA Form 8710-1, see Doc #88, Wood Decl, Ex 62—is not the form that Cooper actually submitted to the FAA.

The forms that Cooper actually submitted to the FAA contained a notice that states that the information provided may be used "to comply with the Prefatory Statement of General Routine Uses for the Department of Transportation." Doc #101-5 at 16, Wang Decl, Ex 16. And it is within the Prefatory Statement of General Routine Uses for the Department of Transportation that the routine uses defendants argue are applicable are found.

Assuming without deciding that notifying Cooper of the location in the Federal Register where additional routine uses can be found satisfies the notice requirement of 5 USC § 552a(e)(3)(C), an examination of the routine uses cited by the government reveals that the DOT-OIG's use of Cooper's records—transferring them to the SSA-OIG for analysis to discover fraud on the DOT or SSA—is not within their scope. Defendants argue that DOT-OIG's use of Cooper's records falls within general routine uses 1 and 9, see Doc #100 at 21-23. These routine uses are listed in the Federal Register:

> 1. In the event that a system of records maintained by DOT to carry out its functions *indicates a violation or potential violation of law*, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program pursuant thereto, *the relevant records in the system of records may be referred*, as a routine use, to the appropriate agency, whether Federal, state, local or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation, or order issued pursuant thereto.
>
> * * *
>
> 9. DOT may make available to another agency or instrumentality of any government jurisdiction, including State and local governments, *listings of names* from any system of records in DOT for use in law enforcement activities, either civil or criminal, or to expose fraudulent claims, regardless of the stated purpose for the collection of the information in the

> system of records. These enforcement activities are generally referred to as matching programs because two lists of names are checked for match using automated assistance. *This routine use is advisory in nature and does not offer unrestricted access to systems of records for such law enforcement and related antifraud activities.* Each request will be considered on the basis of its purpose, merits, cost effectiveness and alternatives using Instructions on reporting computer matching programs to the Office of Management and Budget, OMB, Congress and the public, published by the Director, OMB, dated September 20, 1989.

65 FR 19476, 19477-78.

DOT-OIG's use of Cooper's information does not fall into either of these routine uses. Routine use 1 allows sharing with an appropriate federal agency only when a system of DOT records "indicates a violation or potential violation of the law." When DOT-OIG sent the name, social security number, date of birth and gender of approximately 45,000 pilots to SSA-OIG, it was not because those records indicated a violation or potential violation of the law. Rather, the records were sent to *discover* violations or potential violations.

And while routine use 9 allows sharing of records for law enforcement activities "regardless of the stated purpose for the collection of the information," it only allows the disclosure of names. DOT-OIG's sharing of social security numbers, dates of birth and gender is clearly beyond the scope of this routine use.

Because DOT-OIG transmitted Cooper's records to another agency without his prior consent and this use

does not fall within the routine use or another exception to 5 USC § 552a(b), the DOT-OIG's use of Cooper's record was unlawful under 5 USC § 552a(b).

2

The court turns next to SSA-OIG's sharing of Cooper's social security records. That use occurred around March or April 2004, when SSA-OIG Agent Johnson provided DOT-OIG Agent Jackson comparisons of the DOT-OIG data with the SSA-OIG's records, including a spreadsheet showing that Cooper had received Title II disability payments.

Cooper first argues that the notice provided on the form he used to submit his information to SSA was insufficient. Doc #67 at 21-22. That form appears in the record at Doc #114-2 at 2-9, Wood Opp Decl, Ex 1. The form's Privacy Act notice indicates that the information furnished on the form may be used "to enable a third party or agency to assist Social Security in establishing rights to Social Security benefits and/or coverage." Doc #114-2 at 2, Wood Decl, Ex 1 at SSA0034.

Defendants argue that this is adequate notice of their asserted routine uses, see Doc #100 at 18. Those uses are listed in the Federal Register:

> a. Information from this system of records may be disclosed to *any other federal agency* or any foreign, state, or local government agency *responsible for enforcing, investigating, or prosecuting violations of administrative, civil, or criminal law* or regulation where that information is relevant to an enforcement proceeding, investigation, or prosecution within the agency's jurisdiction.

* * *

c. Information from this system of records may be disclosed to a federal, state, or local agency maintaining civil, criminal or other relevant enforcement records or other pertinent records such as current licenses, *if necessary to obtain a record relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a license*, grant or other benefit.

* * *

m. *Information from this system of records may be disclosed to third party contacts*, including public and private organizations, in order to obtain information relevant and necessary to the investigation of potential violations in HHS programs and operations, *or where disclosure would enable the OIG to identify violations in HHS programs or operations* or otherwise assist the OIG in pursuing on-going investigations.

55 FR 46248, 46249-50 (emphasis added).

The court agrees with defendants that SSA-OIG's use of the records is probably within the scope of each of these routine uses. The use is within the scope of routine use (a) because the records were provided to DOT-OIG, another federal agency responsible for enforcing, investigating or prosecuting violations of law and the information was relevant to an investigation within DOT-OIG's jurisdiction. The use is arguably within the scope of routine use (c) because the records were disclosed to a federal agency maintaining licenses—pilot licenses, in this case—in order to obtain a record con-

cerning the issuance of the license. And the use was clearly within the scope of routine use (m) because the disclosure enabled SSA-OIG to identify violations in HHS programs; in the case of OSP, the disclosure enabled SSA-OIG to identify disability fraud.

SSA-OIG's use of Cooper's records, however, suffered from a different problem. It failed to satisfy the independent requirement of 5 USC § 552a(e)(3)(C) that notice be provided of "the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection." Of the routine uses the disability application form gave notice of, only one comes close to giving notice of the routine uses that could justify SSA-OIG's use of the record: the provision that the information could be used "to enable a third party or agency to assist Social Security in establishing rights to Social Security benefits and/or coverage." But this does not give notice of those routine uses—while the records were given to a third party, they were not given to a third party to assist Social Security in *establishing* rights to benefits. Cooper's rights to benefits already had been established when he received benefits for a short period beginning in 1996. This notice is not sufficient to notify Cooper that the information could be used eight years later to determine whether Cooper and others had lied to the SSA or the FAA.

Defendants argue that the notice somehow is made adequate by the fact that the disability application form notified Cooper that "anyone making a false statement or representation of a material fact for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal law." Doc #100 at 19; see Doc #114-2 at 7, Wood Opp Decl, Ex 1 at

SSA00339. But this statement of fact does not constitute a notification of potential uses of the information and, indeed, it appears on the form five pages after the Privacy Act notice.

Defendants also argue that the notice is made adequate by the fact that the notice warns that the list of routine uses is not exhaustive. Doc #100 at 19 (quoting section of form which states: "These and other reasons why information about you may be used or given out are explained in the Federal Register. If you would like more information about this, any Social Security office can assist you." Doc #114-2 at 2, Wood Opp Decl, Ex 1 at SSA00334). In support of this argument, defendants cite *Stafford v Social Security Administration*, 437 F Supp 2d 1113, 1119 (N D Cal 2006) (Laporte, MJ), a case in which a magistrate judge of this court held that the "these and other reasons" provision allowed the SSA to disclose information for routine uses not explicitly mentioned on the form.

The court respectfully disagrees with Magistrate Judge Laporte's decision, as it is contrary to the plain language of 5 USC § 552a(e)(3)(C), which requires notice of "the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection." This statutory provision requires notice of routine uses *as* they are published, not notice *that* they are published. Magistrate Judge Laporte was concerned that such a strict reading of the notice requirement would put a "impractical burden on federal agencies," but it imposes no real burden; it merely requires agencies to state routine uses on their forms broadly enough to give reasonable notice of the various routine uses contained in the Federal Register. For example,

the SSA form at issue here could have given notice of all three routine uses cited by defendants if it had stated: "This information may be shared with other government agencies for general law enforcement purposes." "Under the plain terms of the statute, a collecting agnecy is under a duty to inform the individuals from whom it is collecting information of the routine uses to which that information may be put. The statute gives the agency no discretion not to discharge the duty." *Covert*, 876 F2d at 755-56.

Accordingly, the court finds that the SSA-OIG's transmission of Cooper's records to another agency without his prior consent was unlawful under 5 USC § 552a(b).

B

Having shown that the DOT-OIG and the SSA-OIG improperly shared his information with each other, to prove his claim, Cooper also must prove that the violation of 5 USC § 552a(b) was intentional or willful.

In the Ninth Circuit, to prove willful or intentional violation of the Privacy Act, a plaintiff must show something "'only somewhat greater than gross negligence.'" *Covert*, 876 F2d at 756 (internal quotation omitted). This rather opaque standard raises a number of questions which presumably the court of appeals will clarify in the event of appellate proceedings herein, so the court will not linger long on this element. Suffice it to say, the fact that a government agency follows its own disclosure guidelines is not decisive, and the "real question" is "how tenable the government's legal arguments are." *Covert*, 876 F2d at 757.

Defendants' arguments against willfulness focus on the fact that both SSA-OIG and DOT-OIG agents working on OSP state that they considered the joint investigation's Privacy Act implications. Doc #100 at 25.

Cooper counters that willfulness is shown by the fact that an investigation involving the sharing of a huge amount of personal information was conducted by agents without meaningful training on the Privacy Act and with little effort by either agency to ensure Privacy Act compliance. Doc #67 at 24-25. As evidence of the government's carelessness, Cooper notes several missteps by defendants, including the undisputed fact that SSA-OIG did not follow its own Privacy Act guideline requiring that an investigative file be opened *prior* to the sharing of information with DOT-OIG. In addition, the court notes that it is difficult to see a legitimate basis for DOT-OGI's belief that its sharing of information with SSA-OGI fell within one of its two cited routine uses when the use was so clearly beyond the scope of those routine uses.

It appears that Cooper has at least raised a triable issue whether the Privacy Act violations were willful, but at this juncture the court need not further address the issue because, as discussed below, Cooper failed to offer any evidence that the Privacy Act violations caused him actual damages, as the court understands that term is interpreted in the present context.

C

Cooper argues that he has suffered an adverse effect and actual damages in the form of mental distress. Doc #67 at 27. Cooper argues that he suffered mental distress from the disclosure of his HIV status, which was

covered by the press after the public announcement of his indictment. See, e g, Doc #91 at 8, 10-11, Cooper Decl at ¶¶28, 35. Cooper offers evidence that he suffered severe emotional distress in the form of his own declaration, Doc #91 at 9-10, Cooper Decl at ¶¶29, 33, a report from a psychiatrist who interviewed Cooper in preparation for this litigation, see Doc #94, and declarations from three friends who interacted with him after the disclosure. See Doc #95 at 2-3, Carter Decl at ¶4; Doc #96 at 3, Hart Decl at ¶9; Doc #98 at 2-3, 4, Odets Decl at ¶¶6, 12. Cooper did not seek professional counseling or medications to treat the emotional distress. Doc #91 at 10, Cooper Decl at ¶34. Cooper has not offered evidence of any pecuniary damages.

1

"The adverse effect requirement of [5 USC §552a] (g)(1)(D) is, in effect, a standing requirement." *Quinn v Stone*, 978 F2d at 126, 136 (3d Cir 1992) (citing *Parks v US Internal Revenue Service*, 618 F2d 677, 682-83 (10th Cir 1980)). Allegations of mental distress are sufficient to confer standing. *Stone*, 978 F2d at 136 (citing *Albright v United States*, 732 F2d 181, 186 (DC Cir 1984); *Parks*, 618 F2d at 683). In addition, to state a Privacy Act claim, Cooper must establish a causal connection between the violation and the adverse effect. *Hewitt v Grabicki*, 794 F2d 1373, 1379 (9th Cir 1986).

Defendants argue that Cooper has not satisfied the adverse effect requirement because the emotional distress may have come from his own disclosures of his HIV status to the press and from his own wrongful acts. Doc #100 at 26. Cooper argues, and the court agrees, that disclosure by Cooper subsequent to disclosure by

defendants and distress occasioned by prosecution for his crime do not necessarily negate a causal connection between defendants' violations of the Privacy Act and Cooper's emotional distress. See Doc #113 at 18 ("The precise contours of what he may recover and how his actionable distress may relate to any nonactionable distress are issues that go to the quantum, and not the fact, of damage.")

2

But while allegations of mental distress are sufficient to establish that Cooper meets the "adverse effect" standing requirement, they are insufficient to meet the requirement of actual damages. As discussed above, the Supreme Court has held that actual damages are a required element of claims brought under 5 USC § 552a(g)(D). *Chao*, 540 US at 617-18. The Court has not, however, addressed the issue whether non-pecuniary harm, such as emotional distress, qualifies as actual damages. *Chao*, 540 US at 622 n5. No circuit has addressed the issue since the Supreme Court's *Chao* decision.

The Ninth Circuit has never addressed whether "actual damages" includes non-pecuniary damages in the context of 5 USC § 552a(g)(4)(A). It has, however, addressed use of the term in other statutes, and a review of its decisions demonstrates that the term "actual damages" is facially ambiguous. For purposes of the Securities Exchange Act, 15 USC § 78bb(a), for example, the Ninth Circuit held that "[a]ctual damages mean some form of economic loss". *Ryan v Foster & Marshall, Inc*, 556 F2d 460, 464 (9th Cir 1977). In the context of copyright infringement, the Ninth Circuit held that "actual

damages" recoverable under 17 USC § 504(a) are limited to objectively measurable financial loss. *Mackie v Rieser*, 296 F3d 909, 917 (9th Cir 2002). On the other hand, the Ninth Circuit treats emotional distress and humiliation as "actual damages" for violations of the Fair Credit Reporting Act, 15 USC § 1681. *Guimond v Trans Union Credit Information Co*, 45 F3d 1329, 1332-33 (9th Cir 1995).

Two circuits that have addressed the definition of actual damages in the context of the Privacy Act examined the statute's legislative history to reach different conclusions. In *Fitzpatrick v Internal Revenue Service*, 665 F2d 327 (11th Cir 1982), the Eleventh Circuit focused on the evolution of the Privacy Act's damages provisions and noted that while early versions of the legislation included provisions for punitive damages and general damages, these damages provisions were not included in the version that became law. *Fitzpatrick*, 665 F2d at 329-31. The court found support in the legislative history for a narrow reading of actual damages and held that "'actual damages' as used in the Privacy Act permits recovery only for proven pecuniary losses and not for generalized mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries." *Fitzpatrick*, 665 F2d at 331. In *Johnson v Department of Treasury IRS*, 700 F2d 971 (5th Cir 1983), the Fifth Circuit reached the opposite conclusion. The court noted that one of the Privacy Act's stated purposes is requiring federal agencies to "be subject to civil suit for *any damages* which occur as a result of willful or intentional" violation." *Johnson*, 700 F2d at 974-75; see 88 Stat 1896 § 2(b)(6). After a lengthy analysis of the legislative history, see *Johnson*, 700 F2d at 974-83, the Fifth

Circuit concluded that the plaintiff there could recover for proven mental injuries. *Johnson*, 700 F2d at 986.

The court need not, however, conduct its own analysis of the legislative history to reach the conclusion that mental distress alone does not satisfy the Privacy Act's actual damages requirement. Defendants argue, and the court agrees, that the issue must be decided by the rule that when "analyzing whether Congress has waived the immunity of the United States, [courts] must construe waivers strictly in favor of the sovereign * * * and not enlarge the waiver beyond what the language requires." *Library of Congress v Shaw*, 478 US 310, 318 (1986).

The Ninth Circuit applied this rule in *Siddiqui v United States*, 359 F3d 1200 (9th Cir 2004), to hold that a statute, 26 USC § 7341(c), that allowed damages against the government of actual damages "plus" punitive damages did not authorize punitive damages absent proof of actual damages where the statute did not state that actual damages were required for punitive damages or that punitive damages could be awarded even in the absence of actual damages. *Siddiqui*, 359 F3d at 1204. The court held that because a damages award against the government is allowed only pursuant to an express waiver of sovereign immunity, "ambiguity whether § 7431(c) authorizes a punitive damages award absent proof of actual damages must be resolved in favor of the Government." *Siddiqui*, 359 F3d at 1204. This rule is equally applicable here: ambiguity as to whether 5 USC § 552a(g)(4)(A)'s provision for actual damages includes mental distress without evidence of pecuniary damages must be resolved in favor of the government defendants.

Accordingly, because Cooper has presented no evidence of pecuniary damages, he has not demonstrated that a triable issue of material fact exists as to the actual damages element of his claim. Defendants are entitled to summary judgment.

IV

As discussed above, DOT-OIG and SSA-OIG improperly shared records, including Cooper's, with each other in violation of the Privacy Act. But because the court determines that Cooper must present evidence of pecuniary damages to satisfy the actual damages element of his claim and because Cooper has presented no such evidence, the court must DENY Cooper's motion for partial summary judgment, Doc #66, and GRANT defendants' motion for summary judgment. Doc #100.

IT IS SO ORDERED.

/s/ VAUGHN R WALKER
VAUGHN R WALKER
United States District Chief Judge

APPENDIX C

1. Pub. L. No. 93-579 provides in pertinent part:

* * * * *

SEC. 2. (a) The Congress finds that—

(1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;

(2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;

(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

(b) The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to—

(1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;

(2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;

(3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

(5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and

(6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act.

* * * * *

SEC. 5. (a) (1) There is established a Privacy Protection Study Commission (hereinafter referred to as the "Commission") which shall be composed of seven members as follows:

(A) three appointed by the President of the United States,

(B) two appointed by the President of the Senate, and

(C) two appointed by the Speaker of the House of Representatives.

Members of the Commission shall be chosen from among persons who, by reason of their knowledge and expertise in any of the following areas-civil rights and liberties, law, social sciences, computer technology, business, records management, and State and local government-are well qualified for service on the Commission.

(2) The members of the Commission shall elect a Chairman from among themselves.

(3) Any vacancy in the membership of the Commission, as long as there are four members in office, shall not impair the power of the Commission but shall be filled in the same manner in which the original appointment was made.

(4) A quorum of the Commission shall consist of a majority of the members, except that the Commission may establish a lower number as a quorum for the purpose of taking testimony. The Commission is authorized to establish such committees and delegate such authority to them as may be necessary to carry out its functions. Each member of the Commission, including the Chairman, shall have equal responsibility and authority

in all decisions and actions of the Commission, shall have full access to all information necessary to the performance of their functions, and shall have one vote. Action of the Commission shall be determined by a majority vote of the members present. The Chairman (or a member designated by the Chairman to be acting Chairman) shall be the official spokesman of the Commission in its relations with the Congress, Government agencies, other persons, and the public, and, on behalf of the Commission, shall see to the faithful execution of the administrative policies and decisions of the Commission, and shall report thereon to the Commission from time to time or as the Commission may direct.

(5) (A) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of that request to Congress.

(B) Whenever the Commission submits any legislative recommendations, or testimony, or comments on legislation to the President or Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

(b) The Commission shall—

(1) make a study of the data banks, automated data processing programs, and information systems of governmental, regional, and private organizations,

in order to determine the standards and procedures in force for the protection of personal information; and

(2) recommend to the President and the Congress the extent, if any, to which the requirements and principles of section 552a of title 5, United States Code, should be applied to the information practices of those organizations by legislation, administrative action, or voluntary adoption of such requirements and principles, and report on such other legislative recommendations as it may determine to be necessary to protect the privacy of individuals while meeting the legitimate needs of government and society for information.

(c) (1) In the course of conducting the study required under subsection (b) (1) of this section, and in its reports thereon, the Commission may research, examine, and analyze—

(A) interstate transfer of information about individuals that is undertaken through manual files or by computer or other electronic or telecommunications means;

(B) data banks and information programs and systems the operation of which significantly or substantially affect the enjoyment of the privacy and other personal and property rights of individuals;

(C) the use of social security numbers, license plate numbers, universal identifiers, and other symbols to identify individuals in data banks and to gain access to, integrate, or centralize information systems and files; and

(D) the matching and analysis of statistical data, such as Federal census data, with other sources of personal data, such as automobile registries and telephone directories, in order to reconstruct individual responses to statistical questionnaires for commercial or other purposes, in a way which results in a violation of the implied or explicitly recognized confidentiality of such information.

(2) (A) The Commission may include in its examination personal information activities in the following areas: medical; insurance; education; employment and personnel; credit, banking and financial institutions; credit bureaus; the commercial reporting industry; cable television and other telecommunications media; travel, hotel and entertainment reservations; and electronic check processing.

(B) The Commission shall include in its examination a study of—

(i) whether a person engaged in interstate commerce who maintains a mailing list should be required to remove an individual's name and address from such list upon request of that individual;

(ii) whether the Internal Revenue Service should be prohibited from transfering individually indentifiable data to other agencies and to agencies of State governments;

(iii) whether the Federal Government should be liable for general damages incurred by an individual as the result of a willful or intentional violation of the provisions of sections 552a (g) (1) (C) or (D) of title 5, United States Code; and

(iv) whether and how the standards for security and confidentiality of records required under section 552a (e) (10) of such title should be applied when a record is disclosed to a person other than an agency.

(C) The Commission may study such other personal information activities necessary to carry out the congressional policy embodied in this Act, except that the Commission shall not investigate information systems maintained by religious organizations.

(3) In conducting such study, the Commission shall—

(A) determine what laws, Executive orders, regulations, directives, and judicial decisions govern the activities under study and the extent to which they are consistent with the rights of privacy, due process of law, and other guarantees in the Constitution;

(B) determine to what extent governmental and private information systems affect Federal-State relations or the principle of separation of powers;

(C) examine the standards and criteria governing programs, policies, and practices relating to the collection, soliciting, processing, use, access, integration, dissemination, and transmission of personal information; and

(D) to the maximum extent practicable, collect and utilize findings, reports, studies, hearing transcripts, and recommendations of governmental, legislative and private bodies, institutions, organizations, and individuals which pertain to the problems under study by the Commission.

(d) In addition to its other functions the Commission may—

(1) request assistance of the heads of appropriate departments, agencies, and instrumentalities of the Federal Government, of State and local governments, and other persons in carrying- out its functions under this Act;

(2) upon request, assist Federal agencies in complying with the requirements of section 552a of title 5, United States Code;

(3) determine what specific categories of information, the collection of which would violate an individual's right of privacy, should be prohibited by statute from collection by Federal agencies; and

(4) upon request, prepare model legislation for use by State and local governments in establishing procedures for handling, maintaining, and disseminating personal information at the State and local level and provide such technical assistance to State and local governments as they may require in the preparation and implementation of such legislation.

(e) (1) The Commission may, in carrying out its functions under this section, conduct such inspections, sit and act at such times and places, hold such hearings, take such testimony, require by subpoena the attendance of such witnesses and the production of such books, records, papers, correspondence, and documents, administer such oaths, have such printing and binding done, and make such expenditures as the Commission deems advisable. A subpoena shall be issued only upon an affirmative vote of a majority of all members of the

Commission. Subpoenas shall be issued under the signature of the Chairman or any member of the Commission designated by the Chairman and shall be served by any person designated by the Chairman or any such member. Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission.

(2) (A) Each department, agency, and instrumentality of the executive branch of the Government is authorized to furnish to the Commission, upon request made by the Chairman, such information, data, reports and such other assistance as the Commission deems necessary to carry out its functions under this section. Whenever the head of any such department, agency, or instrumentality submits a report pursuant to section 552a (o) of title 5, United States Code, a copy of such report shall be transmitted to the Commission.

(B) In carrying out its functions and exercising its powers under this section, the Commission may accept from any such department, agency, independent instrumentality, or other person any individually indentifiable data if such data is necessary to carry out such powers and functions. In any case in which the Commission accepts any such information, it shall assure that the information is used only for the purpose for which it is provided, and upon completion of that purpose such information shall be destroyed or returned to such department, agency, independent instrumentality, or person from which it is obtained, as appropriate.

(3) The Commission shall have the power to—

(A) appoint and fix the compensation of an executive director, and such additional staff personnel as

may be necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title; and

(B) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code.

The Commission may delegate any of its functions to such personnel of the Commission as the Commission may designate and may authorize such successive redelegations of such functions as it may deem desirable.

(4) The Commission is authorized—

(A) to adopt, amend, and repeal rules and regulations governing the manner of its operations, organization, and personnel;

(B) to enter into contracts or other arrangements or modifications thereof, with any government, any department, agency, or independent instrumentality of the United States, or with any person, firm, association, or corporation, and such contracts or other arrangements, or modifications thereof, may be entered into without legal consideration, without performance or other bonds, and without regard to section 3709 of the Revised Statutes, as amended (41 U.S.C. 5);

(C) to make advance, progress, and other payments which the Commission deems necessary under

this Act without regard to the provisions of section 3648 of the Revised Statutes, as amended (31 U.S.C. 529); and

(D) to take such other action as may be necessary to carry out its functions under this section.

(f) (1) Each [the] member of the Commission who is an officer or employee of the United States shall serve without additional compensation, but shall continue to receive the salary of his regular position when engaged in the performance of the duties vested in the Commission.

(2) A member of the Commission other than one to whom paragraph (1) applies shall receive per diem at the maximum daily rate for GS-18 of the General Schedule when engaged in the actual performance of the duties vested in the Commission.

(3) All members of the Commission shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the Commission.

(g) The Commission shall, from time to time, and in an annual report, report to the President and the Congress on its activities in carrying out the provisions of this section. The Commission shall make a final report to the President and to the Congress on its findings pursuant to the study required to be made under subsection (b) (1) of this section not later than two years from the date on which all of the members of the Commission are appointed. The Commission shall cease to exist thirty days after the date on which its final report is submitted to the President and the Congress.

(h) (1) Any member, officer, or employee of the Commission, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any person who knowingly and willfully requests or obtains any record concerning: an individual from the Commission under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

* * * * *

2. Section 552a of Title 5, United States Code, provides:

Records maintained on individuals

(a) DEFINITIONS.—For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited

to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(8) the term "matching program"—

(A) means any computerized comparison of—

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of—

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants

for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include—

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration

as defined in section 6103(b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

(v) matches–

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II)
conducted by an agency using only records from systems of records maintained by that agency;

if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel;

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(vii) matches performed incident to a levy described in section 6103(k)(8) of the Internal Revenue Code of 1986;

(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (42 U.S.C. 402(x)(3), 1382(e)(1)); or

(ix) matches performed by the Secretary of Health and Human Services or the Inspector General of the Department of Health and Human Services with respect to potential fraud, waste, and abuse, including matches of a system of records with non-Federal records;

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(b) CONDITIONS OF DISCLOSURE.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

(c) ACCOUNTING OF CERTAIN DISCLOSURES.—Each agency, with respect to each system of records under its control, shall—

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) ACCESS TO RECORDS.—Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days

(excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) AGENCY REQUIREMENTS.—Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be

accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) AGENCY RULES.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individ-

ual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) CIVIL REMEDIES.—Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such

record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason

of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) RIGHTS OF LEGAL GUARDIANS.—For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) CRIMINAL PENALTIES.—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) GENERAL EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt

any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) SPECIFIC EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(*l*)(1) ARCHIVAL RECORDS.—Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the require-

ments of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m)(1) GOVERNMENT CONTRACTORS.—When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(e) of title 31 shall not be considered a contractor for the purposes of this section.

(n) MAILING LISTS.—An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) MATCHING AGREEMENTS.—(1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying—

(A) the purpose and legal authority for conducting the program;

(B) the justification for the program and the anticipated results, including a specific estimate of any savings;

(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to—

(i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and

(ii) applicants for and holders of positions as Federal personnel,

that any information provided by such applicants, recipients, holders, and individuals may be subject to verification through matching programs;

(E) procedures for verifying information produced in such matching program as required by subsection (p);

(F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;

(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;

(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;

(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and

(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(2)(A) A copy of each agreement entered into pursuant to paragraph (1) shall—

(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and

(ii) be available upon request to the public.

(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(I).

(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without additional review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if—

(i) such program will be conducted without any change; and

(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(p) VERIFICATION AND OPPORTUNITY TO CONTEST FINDINGS.—(1) In order to protect any individual whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual, as a result of information produced by such matching program, until—

(A)(i) the agency has independently verified the information; or

(ii) the Data Integrity Board of the agency, or in the case of a non-Federal agency the Data Integrity Board of the source agency, determines in accor-

dance with guidance issued by the Director of the Office of Management and Budget that—

(I) the information is limited to identification and amount of benefits paid by the source agency under a Federal benefit program; and

(II) there is a high degree of confidence that the information provided to the recipient agency is accurate;

(B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and

(C)(I) the expiration of any time period established for the program by statute or regulation for the individual to respond to that notice; or

(ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on which notice under subparagraph (B) is mailed or otherwise provided to the individual.

(2) Independent verification referred to in paragraph (1) requires investigation and confirmation of specific information relating to an individual that is used as a basis for an adverse action against the individual, including where applicable investigation and confirmation of—

(A) the amount of any asset or income involved;

(B) whether such individual actually has or had access to such asset or income for such individual's own use; and

(C) the period or periods when the individual actually had such asset or income.

(3) Notwithstanding paragraph (1), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during any notice period required by such paragraph.

(q) SANCTIONS.—(1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to subsection (o), or both, are not being met by such recipient agency.

(2) No source agency may renew a matching agreement unless—

(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(B) the source agency has no reason to believe that the certification is inaccurate.

(r) REPORT ON NEW SYSTEMS AND MATCHING PROGRAMS.—Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in

order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

(s) BIENNIAL REPORT.—The President shall biennially submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report—

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;

(2) describing the exercise of individual rights of access and amendment under this section during such years;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974.

(t)(1) EFFECT OF OTHER LAWS.—No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

(u) DATA INTEGRITY BOARDS.—(1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this section.

(2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.

(3) Each Data Integrity Board—

(A) shall review, approve, and maintain all written agreements for receipt or disclosure of agency records for matching programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;

(B) shall review all matching programs in which the agency has participated during the year, either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;

(C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;

(D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the

public on request, describing the matching activities of the agency, including—

(i) matching programs in which the agency has participated as a source agency or recipient agency;

(ii) matching agreements proposed under subsection (o) that were disapproved by the Board;

(iii) any changes in membership or structure of the Board in the preceding year;

(iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;

(v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and

(vi) any other information required by the Director of the Office of Management and Budget to be included in such report;

(E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;

(F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;

(G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and

(H) may review and report on any agency matching activities that are not matching programs.

(4)(A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective.

(B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.

(C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval of a written agreement for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.

(5)(A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that—

(i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;

(ii) there is adequate evidence that the matching agreement will be cost-effective; and

(iii) the matching program is in the public interest.

(C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).

(D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching program proposed by the inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.

(6) In the reports required by paragraph (3)(D), agency matching activities that are not matching programs may be reported on an aggregate basis, if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.

(v) OFFICE OF MANAGEMENT AND BUDGET RESPONSIBILITIES.—The Director of the Office of Management and Budget shall—

(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations

for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to and oversight of the implementation of this section by agencies.

(w) APPLICABILITY TO BUREAU OF CONSUMER FINANCIAL PROTECTION.—Except as provided in the Consumer Financial Protection Act of 2010, this section shall apply with respect to the Bureau of Consumer Financial Protection.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 3:07-cv-01383-VRW

STANMORE C. COOPER, A CALIFORNIA RESIDENT, PLAINTIFF

v.

FEDERAL AVIATION ADMINISTRATION, SOCIAL SECURITY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION, DEFENDANTS

Filed: July 10, 2007

FIRST AMENDED COMPLAINT FOR: VIOLATION 5 U.S.C. § 522A (THE PRIVACY ACT OF 1974)

Plaintiff Stanmore C. Cooper ("Cooper") alleges as follows:

PRELIMINARY STATEMENT

1. This action arises from the extensive exchange of protected, private medical information and records among the Federal Department of Transportation, the Federal Aviation Administration, and the Social Security Administration under the auspices of "Operation

Safe Pilot". Each exchange was violative of the Privacy Act of 1974 (5 U.S.C. § 522a).

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331 and 5 U.S.C. § 552a(g)(5) because this action seeks to redress a violation of the Privacy Act of 1974. This Court has supplemental jurisdiction over the remaining cause of action alleged pursuant to 28 U.S.C. § 1367(a). Venue is proper in this judicial district pursuant to 5 U.S.C. § 552a(g)(5), as Plaintiff resides in this district.

PARTIES

3. Plaintiff Stanmore C. Cooper (referred to hereafter as "Cooper" or "Plaintiff"), an individual, is, and at all times mentioned was, a resident of the City and County of San Francisco, California.

4. Defendant Federal Aviation Administration (referred to as "FAA") is an agency of the United States Department of Transportation. FAA regulates civil aviation in the United States, including the licensing of pilots.

5. Defendant United States Department of Transportation (referred to as "DOT") is a Cabinet-level executive department of the United States government concerned with the national transportation system. FAA is a branch of DOT.

6. Defendant Social Security Administration (referred to as "SSA") is an independent agency of the United States government which pays retirement, dis-

ability and survivors benefits to workers and their families, and administers the Supplemental Security Income program. SSA is also responsible for the issuance of Social Security numbers.

7. Defendants FAA, DOT, and SSA will be referred to as "Defendants."

STATEMENT OF FACTS

BACKGROUND FACTS

8. Defendant FAA issued Cooper his Private Pilot Certificate on September 11, 1964. With over 2,000 hours as Pilot-In-Command since then, Cooper has never been in any aviation-related incident or accident. From September 11, 1965 to March 21, 2005, FAA never charged Cooper with violating any federal aviation regulations. Cooper is currently licensed by FAA as a Private Pilot, Single Engine Airplane Land.

9. While licensed, Cooper discovered in 1985 that he was HIV-positive. Because FAA at the time would not issue a medical certificate to a HIV-positive individual who was taking anti-retroviral medications, he voluntarily grounded himself and did not renew his medical certificate. A medical certificate is issued as a condition to receiving a Private Pilot Certificate. Mr. Cooper later accepted a position with Visa International where he was employed as a Senior Network Engineer.

10. In July, 1994, Cooper applied for and received an FAA Third Class Medical Certificate without disclosing his HIV status or listing the anti-retroviral drugs he was taking. Cooper used this Medical Certificate solely to act as "Safety Pilot" while flying with friends maintaining instrument flying currency, and was never used for

Cooper to act as pilot-in-command. Between the July, 1994, Medical Certificate application and his subsequent Medical Certificate application in September, 1998, FAA records show Cooper did not log any flight time since Cooper's total hours on both applications was 1,712 hours.

11. By June 1995, Cooper had lost considerable weight and suffered from peripheral neuropathy in his lower extremities, chronic diarrhea, and a failing immune system due to his HIV infection. Because of his failing health, in August 1995, Cooper left his position at Visa International and applied for Social Security long-term disability benefits based upon these HIV related complications. His HIV status and complications were the basis for the disability claim and were disclosed in his Social Security application.

12. In applying for these Social Security benefits, SSA advised Cooper about his privacy rights and affirmed that his personal medical information would be shared only with other federal agencies when this information would be needed to assist in the administration of programs under the Social Security Act and other federal, state, and local health and income maintenance programs concerning determinations related to eligibility, benefit amounts, or benefits status. *See* Social Security Online web article entitled "Government Information Exchange," attached hereto as Exhibit A. Cooper believed this information and relied upon it to be accurate and true. Cooper began receiving Social Security disability benefits in August 1995.

13. In early 1996, a new class of anti-HIV drugs, protease inhibitors, became available to patients with

HIV, but due to manufacturing limitations, access to these new drugs was determined by a lottery. Cooper was selected to participate in the limited access program to these protease inhibitors and began taking them, as prescribed by his health care provider, in combination with previously available nucleoside and non-nucleoside reverse transcriptase inhibitors. As a result, Cooper's health care providers determined that his health rapidly improved. His viral load plummeted, his peripheral neuropathy and chronic diarrhea subsided, and he returned to his previous weight and energy.

14. After one year on disability, Cooper terminated his receipt of Social Security benefits and returned to work at Visa International in August 1996 as a Chief Network Architect.

15. In early 1998, Cooper learned that FAA had, in November of 1997, begun issuing "special issuance" medical certificates to HIV-infected persons. With his renewed health and news of certificated HIV-positive pilots, Cooper became interested in obtaining a Third Class Medical Certificate which would permit him to resume his normal flying activities.

16. Plaintiff is informed and believes, and thereon alleges, that at the time FAA had not made the eligibility requirements for the "special issuance" certificates public; interested applicants were required to submit all of their medical records from the date of their infections to FAA for review.

17. Uninformed as to FAA Special Issuance Medical Certificate eligibility requirements and concerned that he would be arbitrarily disqualified, Cooper did not submit this information. Instead, Cooper applied for and

obtained a medical certificate in 1998 without disclosing his HIV status on his application. Cooper obtained his Third Class Medical Certificate in order to resume his normal flying activities.

18. In 2000, Cooper saw the first published certification criteria for issuance of medical certificates to HIV-infected persons. *See* Federal Aviation Administration article entitled "Guidelines for the Medical Certification of Airmen with HIV-Related Conditions," attached hereto as Exhibit B. He then verified that his cell counts and viral loads were within the applicable criteria and in 2000, 2002, and 2004 applied for and obtained medical certificates without disclosing his HIV status.

19. In February 2005, Cooper read a magazine article that announced that FAA Aeromedical Certification Division and the Civil Aeromedical Institute had issued a policy statement which indicated that HIV-infected individuals who voluntarily revealed their previously unreported infections, submitted their medical records, and did not have histories of aviation accident or incidents or positive drug tests would not be subject to disciplinary action. *See* Virtual Flight Surgeons Inc. article entitled "HIV/AIDS," attached hereto as Exhibit C. As a result of reading this article, Cooper began the process of collecting his medical records for submission to FAA but did not have the opportunity to submit them.

DISCLOSURE OF COOPER'S HIV STATUS

20. Plaintiff is informed and believes, and thereon alleges, that following the events of September 11, 2001, SSA received numerous proposed investigative projects from various agencies concerning the Social Security

number ("SSN") misuse by those with access to critical government infrastructure sites.

21. Plaintiff is informed and believes, and thereon alleges, that in 2003, SSA reviewed a proposed project submitted by the DOT Office of Inspector General entitled "Operation Safe Pilot." The sole purpose of "Operation Safe Pilot" was to identify any active FAA-licensed pilot who had obtained a license though the misrepresentation of a SSN on an FAA application. The review was not intended to verify benefit eligibility, effectuate savings to SSA, or to terminate benefits. The sole purpose of the review was to ensure that pilots were who they said they were, and on this basis, SSA approved this project.

22. Plaintiff is informed and believes, and thereon alleges, that FAA not only provided SSA with the names and SSNs of licensed pilots needed to effectuate the stated purposes of "Operation Safe Pilot," but that it also provided SSA with complete copies of pilots' medical certification records and files. Based on this information, SSA discovered that a number of FAA licensed pilots under review for potential SSN misuse were at the time drawing benefits from SSA based on total disability while simultaneously certifying their medical fitness to FAA. As Cooper ceased receiving SSA benefits in 1996, he did not fall into this category of pilots.

23. Plaintiff is informed and believes, and thereon alleges, that SSA reported its finding to FAA and provided FAA with the Social Security files, including confidential medical records, of licensed pilots who were suspected of failing to disclose diagnoses of significant illness, including SSA files concerning Cooper. These files

contained the confidential information of Cooper's HIV status which under state and federal law, as well as under SSA guidelines, is confidential and protected from disclosure by the Privacy Act and the California Constitution.

24. The disclosure of Cooper's confidential information was not pursuant to any "routine use" or legitimate law enforcement function because it was outside of the scope of the stated purposes of the Operation Safe Pilot program.

25. Plaintiff is informed and believes, and thereon alleges, that based solely upon the illegal disclosure and review of Cooper's confidential Social Security files and medical records, FAA issued an Emergency Order of Revocation of Cooper's private pilot certificate on March 22, 2005. *See* Emergency Revocation Order, attached hereto as Exhibit D.

26. On March 22, 2005, Lisa Glazzy, who identified herself as a special agent with the Department of Transportation, left a message on Cooper's home phone stating that DOT wished to discuss some "irregularities" in his FAA medical certificate application. Cooper returned the call and scheduled a meeting to be held on March 23 at a local Starbucks with Agent Glazzy and an Agent Stephen Jackson.

27. At the meeting, Agents Glazzy and Jackson showed Cooper numerous records from his Social Security disability file which, according to Agent Jackson, DOT obtained as a result of a "computer match" between SSA and FAA records. The agents also provided Cooper with a copy of the revocation order and demanded his pilot certificate, medical certificate, and log

book. Cooper surrendered all three items to Agents Glazzy and Jackson.

28. Learning that SSA had disclosed his HIV-status to other federal agencies left Cooper extremely upset, anxious, and fearful of social ostracism.

29. Cooper timely appealed the revocation to the National Transportation Safety Board, and in the process obtained a copy of FAA's evidentiary file. This file contained portions of Cooper's SSA file, including medical records sent to SSA which indicated that Cooper received treatment for HIV-related infection(s). The case was captioned *Blakey v. Cooper*, Docket No. SE-17351.

30. On or about August 30, 2005, Cooper was indicted on three felony counts of making a false statement to a government agency based solely upon his non-disclosure of his HIV status. Each of these counts carried with them a fine of up to $250,000 and a maximum of five years in prison. The case was captioned *U.S. v. Cooper*, CR 05-00549-VRW.

31. On March 7, 2006, Cooper pleaded guilty to a single misdemeanor pursuant to a plea agreement. As a result, the Court fined Cooper $1,000 and sentenced him to two years of unsupervised probation, but allowed him to pursue recertification as a private pilot.

32. After the conclusion of the criminal case, Cooper began the process of regaining his pilot certificate. FAA conducted a review of Cooper's medical history, which spanned more than twenty years. At age 64, Cooper was subjected to cognitive screening tests in which he scored in the 50th percentile or higher when measured against

current airline captains age 55-60. Cooper then reentered ground school and submitted to oral and written examinations as well as a flight test.

33. On September 11, 2006, forty-two years to the day that he first obtained his pilot's license, Cooper received a medical certificate and his private pilot's certificate.

34. Although his right to fly as a HIV-positive pilot has been vindicated, Cooper has suffered and will continue to suffer as a direct and proximate result of the illegal and unconstitutional violation of his right to privacy humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress.

FIRST CLAIM FOR RELIEF

Violation of the Privacy Act of 1974 - 5 USCS § 552a
Against All Defendants

35. Plaintiff re-alleges paragraphs 1 through 33 of this Complaint as if fully set forth herein.

36. Among its many other functions, the Privacy Act (Act), 5 U.S.C.S. § 552a, safeguards individuals from capricious dissemination of personal information by the government. Subsection (b) of the Act, forbids an agency of the United States from disclosing information in its files to any person or to another agency without the express consent of the individual to whom the information pertains. 5 U.S.C.S. § 552a(b). This provision is subject to several exceptions, none of which apply to the present case.

37. A civil action for damages lies whenever any agency violates any of the provisions of The Privacy Act

in such a way as to have an adverse effect on an individual. 5 U.S.C.S. § 552a(g)(1)(D).

38. Each exchange and use of Cooper's confidential medical information about his HIV status among the Defendants, and each of them, without Cooper's consent, as described herein, constituted a violation of the Privacy Act for each such disclosure and use of the information.

39. In disclosing Cooper's medical records, Defendants each acted intentionally and/or willfully and outside of the stated scope of "Operation Safe Pilot."

40. Defendants' unauthorized use of Cooper's confidential medical information, including the disclosure of his HIV status and any use of or reliance upon such information has caused Cooper to suffer humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress.

41. Cooper's humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress were proximately caused by Defendants' unauthorized disclosure and use of his confidential medical information.

42. As a proximate result of each of the Defendant's disclosure and reliance upon the illegal disclosure of this confidential information, Cooper suffered, and will continue to suffer, "adverse effects" in the form of general and special damages, including, but not limited to, pain and suffering, humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress in excess of $1,000.

PRAYER

WHEREFORE, Plaintiff, Stanmore C. Cooper, prays for judgment against Defendants, and each of them, as follows:

1. For general damages in an amount according to proof at trial and as permitted by law;
2. For special damages in an amount according to proof at trial and as permitted by law;
3. For prejudgment interest in an amount according to proof at trial;
4. For reasonable attorneys' fees and costs of suit incurred herein pursuant to 5 U.S.C. § 552a(g)(1)(B);
5. For attorneys' fees and costs of suit incurred by Cooper in *U.S. v. Cooper* pursuant to 5 U.S.C. § 552a(g)(1)(B) as well as for fees and costs of suit incurred by Cooper in *Blakey* v. *Cooper*; and
6. For such other and further relief as the Court may deem just and proper.

DATED: July 10, 2007

REED SMITH LLP

By /s/ ILLEGIBLE
JAMES M. WOOD
TIFFANY RENEE THOMAS
Attorneys for Plaintiff
Stanmore C. Cooper

[EXHIBITS A-D OMITTED]

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 10-1024

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, AND
SOCIAL SECURITY ADMINISTRATION,
Petitioners,

v.

STANMORE CAWTHON COOPER,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

RAYMOND A. CARDOZO
Counsel of Record
JAMES M. WOOD
JAMES C. MARTIN
DAVID J. BIRD
TIFFANY RENEE THOMAS
Reed Smith LLP
101 Second St., Ste. 1800
San Francisco, CA 94105
(415) 543-8700
rcardozo@reedsmith.com
Attorneys for Respondent

Library of
Law Library

QUESTION PRESENTED

Whether a plaintiff can establish "actual damages" under the Privacy Act's civil remedies provision, 5 U.S.C. §§ 552a(g)(1)(C)-(D) and (g)(4), through competent evidence of real and appreciable mental and emotional distress caused by a federal agency's intentional or willful violation of the Act.

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INTRODUCTION

In this case, the court of appeals reversed a summary judgment in petitioners' favor and held that a plaintiff can establish "actual damages" under 5 U.S.C. § 552a(g)(4) through competent evidence of real and appreciable mental and emotional injuries caused by a federal agency's intentional or willful violation of the Privacy Act of 1974, without specific evidence of a pecuniary loss. The court of appeals then remanded for further proceedings on other aspects of the asserted cause of action that had not been adjudicated by the district court.

The court of appeals' decision is simply the latest one to deal with the pecuniary loss issue. The conflict reflected in the decision has existed for 27 years, and appears to have had only transitory impacts in a few cases. Petitioners nevertheless assert that this latest decision somehow, and suddenly, will have "dramatic[]" consequences for future cases, and ask this Court to intervene now. Yet, despite this plea, this Court's review is not warranted for four independent reasons.

First, the case is in an interlocutory posture, and petitioners can obtain further review at a later date, if further review proves appropriate.

Second, the circuit split described in the petition has existed for more than 27 years without any demonstrable, practical effect on claims against the government, much less the dire consequences for the public fisc that petitioners predict.

Third, the split is neither as entrenched, nor as ripe for review, as petitioners suggest and should await further analysis and development in the circuit courts.

Fourth, the panel's decision here is correct and consistent with established precedent, including from this Court.

STATEMENT OF THE CASE

I. The Privacy Act Of 1974

Every day federal agencies ask individuals to volunteer personal information for a wide variety of purposes. In the Privacy Act of 1974, Congress sought to "provide certain safeguards for an individual against an invasion of personal privacy" arising from the mismanagement and misappropriation of personal information held in the records systems of federal agencies. Privacy Act of 1974, Pub. L. No. 93-579, § 2(b), 88 Stat. 1896.

Under the Act, agencies have a duty to collect and maintain information about individuals in a manner that assures that the information is current, complete, accurate for its intended use, and kept secure and confidential to protect against threats and hazards that could result in "substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained." 5 U.S.C. § 552a(e).

In order to maintain confidentiality, the Act closely regulates the disclosure of information from one agency to another and to third parties. An agency generally may not disclose information gathered about an individual to another agency or a third-party, "except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. § 552a(b). Information about an individual contained in agency

records may be disclosed to another agency without the individual's prior written consent only under certain narrowly defined conditions. 5 U.S.C. §§ 552a(b)(1)-(12) (conditions of disclosure).

For those agencies who ignore the Act or its purposes, there are direct consequences. The Act provides for four distinct causes of action to enforce its terms. 5 U.S.C. § 552a(g)(1). Of particular importance here, it provides that an individual may bring a civil suit against an agency for violating the Act if the agency:

> (C) "fails to maintain [its] records with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness" in any determination relating to the individual's "qualifications, character, rights, or opportunities ..., or benefits," resulting in a "determination is made which is adverse to the individual;" or
>
> (D) "fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual[.]"

5 U.S.C. §§ 552a(g)(1)(C)-(D). To further aid in enforcement of its provisions, the Act expressly waives sovereign immunity for the United States and its federal agencies from suit, stating that an individual "may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of [§ 552a(g)]." *Id.* It thereafter also includes a series of paragraphs addressing the standard of review, burden of proof, and relief that

may be ordered under each of its four causes of action. 5 U.S.C. §§ 552a(g)(2)-(4).

In a suit brought under subparagraph (g)(1)(C) (for a failure to maintain records with the accuracy necessary to assure fairness in determinations of qualifications, character, rights, opportunities, and benefits) and in a suit under subparagraph (g)(1)(D) (for failure to comply with any other provision of the Act), "the United States shall be liable to the individual" for agency actions that are "intentional or willful" in "an amount equal to the sum of"—

> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
>
> (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. § 552a(g)(4).

Lastly, but just as importantly, the Act includes an express statement of Congress's purpose in enacting § 552a(g)(1)(C)-(D) and (g)(4): to require that federal agencies "be subject to civil suit for *any* damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." Privacy Act of 1974, Pub. L. 93-579, § 2(b)(6), 88 Stat. 1896 (emphasis added).

This Court has, on one occasion, considered the terms and scope of §§ 552a(g)(1)(C)-(D) and (g)(4). In *Doe v. Chao*, 540 U.S. 614, 618 (2004), it held that a complainant must demonstrate that he or she has sustained some "actual damages" in order to be

entitled to the minimum statutory award of $1,000. *Id.* The Court did not address "the precise definition of actual damages" under subparagraph (g)(4) and expressly cautioned that its decision should not be read to "suggest that out-of-pocket expenses are necessary for recovery of the $1,000 minimum." *Id.* at 627 n.12.

II. Petitioners' Violations Of The Privacy Act

Respondent Stanmore Cawthon Cooper, the plaintiff in this action, was the victim of multiple Privacy Act violations by federal agencies resulting in real and substantial mental and emotional injuries with tangible consequences for his mental health, physical condition, relationships, and ability to function.

In 2003, 2004, and 2005, agents of the U.S. Department of Transportation (DOT) and Social Security Administration (SSA) disclosed and exchanged massive amounts of information contained in the confidential records of the Federal Aviation Administration (FAA) and SSA pertaining to thousands of pilots (including Mr. Cooper). These disclosures were made as part of an investigation known as "Operation Safe Pilot" (OSP). The disclosures were made without requisite notice to, or written consent from, any of the pilots. And importantly, the cross-agency disclosures were made by investigators acting without written approval from the heads of the respective agencies, thus placing the disclosures squarely outside the Privacy Act's exception for cross-agency record exchange for legitimate "civil or criminal law enforcement

activity," 5 U.S.C. § 552a(b)(7). App. 16a-17a, 40a-41a.

Certain SSA agents and counsel raised concerns, when OSP was proposed, that a wide-ranging, cross-agency exchange could violate the Privacy Act. But, rather than demanding strict compliance with the Act, the SSA instead attempted to craft internal procedures to circumvent the Act. These proposed procedures not only were flawed on their face but also were disregarded, immediately, by the agents who actually conducted OSP. App. 41a. Because of these shortcomings, a staggering amount of confidential personal information was disclosed by each agency during OSP in violation of the Privacy Act's record-keeping and confidentiality requirements. App. 17a-18a, 42a-44a (noting the disclosure of FAA records of approximately 45,000 pilots and SSA records of a subset of that group).

In the course of the sweep, agents located some evidence of violations of law, and one involved Mr. Cooper—a private, recreational pilot and aviation enthusiast who properly claimed Social Security disability benefits at one time, but who failed to disclose that he was HIV-positive on FAA medical certification forms. App. 15a, 17a-18a, 43a-44a.

At each stage of OSP, confidential information pertaining to Mr. Cooper was disclosed from one agency to the other, including: (1) the Social Security diagnosis code that indicated that Mr. Cooper was HIV-positive and (2) his complete Social Security disability file, with more than 230 pages of medical records that he had provided confidentially to the SSA. App. 16a-18a, 42a-45a.

In March 2005, DOT agents contacted Mr. Cooper and subsequently confronted him in public in a coffee shop, with a complete copy of his confidential Social Security disability file, including his medical records, as well as an FAA order revoking his pilot certificate. App. 18a, 44a-45a.

III. Mr. Cooper's Injuries Sustained As A Result Of Petitioners' Privacy Act Violations

When Mr. Cooper learned that information contained in his confidential Social Security disability files had been disclosed to agents of DOT, he was emotionally devastated. His declaration, as well as those from four friends who personally observed him, and an expert psychiatrist, established his claim of real and substantial mental and emotional injury. App. 59a-61a.

The record shows that his distress was severe and had tangible consequences for his mental health, physical condition, relationships, and ability to function, including sleeplessness, loss of appetite, physical tension, agitation, isolation from friends, and anxiety. The record also shows that Mr. Cooper's anxiety symptoms prevented him from utilizing his natural sources of psychological support and seeking professional care. He ultimately was diagnosed as suffering from an anxiety disorder with many of the debilitating symptoms of acute distress disorder. *Id.*

IV. Proceedings In The District Court

Mr. Cooper was indicted and ultimately accepted responsibility for his failure to disclose his HIV-

status to the FAA, pleading guilty to a single misdemeanor for making a false official writing.[1] He firmly believed, however, that petitioners *also* should be held accountable because the Act expressly prohibited *their* improper, intentional, and willful cross-agency disclosure of his private records. Mr. Cooper thus brought a Privacy Act suit under 5 U.S.C. § 552a(g)(1)(D), seeking a monetary award for his mental and emotional injuries. App. 18a-19a.

On cross-motions for summary judgment, the district court held: (1) petitioners violated the Act by illegally exchanging information from FAA and Social Security disability files; (2) there was a triable issue of fact on whether petitioners' violations were intentional or willful; and (3) Mr. Cooper had shown that he suffered real and appreciable mental and emotional injury from the violation. App. 18a-19a, 46a-61a.

The district court nevertheless entered summary judgment against Mr. Cooper and in favor of petitioners because it believed that his evidence of mental and emotional injuries could not, as a matter of law, be used to establish "actual damages" under § 552a(g)(4). App. 18a-19a, 61a-64a.

V. The Court Of Appeals' Decision

The Court of Appeals for the Ninth Circuit reversed and remanded for further proceedings. The

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[1] Following his guilty plea, Mr. Cooper applied with the FAA for re-certification as a private pilot. The FAA conducted a review of his entire medical history, including information about his HIV diagnosis and treatment, and re-issued his private pilot certificate and airman medical certificate.

court of appeals found that the district court erred in its exclusive reliance on the sovereign immunity canon and in failing to consider the "full panoply of sources available to it" for evaluating the meaning of the term "actual damages" in context. App. 34a.

To reach its result, the court of appeals alternately considered: the plain meaning of the term "actual damages" in isolation; the term as it appears in the context of the entire Act; relevant precedents from this Court concerning invasions of privacy and defamation, as well as common law authorities; the construction of other federal statutes that provide monetary awards for "actual damages" caused by violations of statutory privacy rights; and traditional canons of construction, including the aforementioned sovereign immunity canon. App. 22a-36a.

With these sources of information and tools of construction in hand, the panel unanimously concluded that petitioners' narrow construction of "actual damages" is not plausible; "actual damages" is unambiguous when read in the context of the Privacy Act; and Congress clearly intended to provide a monetary award for both pecuniary and nonpecuniary damages that are proven to have been caused by an agency's intentional or willful violation of the Act. Accordingly, it reversed and remanded for further proceedings. App. 36a-37a.

Petitioners sought rehearing and rehearing en banc. The court of appeals issued an amended opinion (deleting a footnote not relevant to the question presented) and two separate opinions respecting the denial of rehearing en banc. App. 1a-14a. Judge O'Scannlain, joined by seven other judges, dissented from the denial of rehearing en banc,

arguing that the panel had failed to apply the sovereign immunity canon to an ambiguous term and erroneously relied upon the Act's express statement of Congressional findings and purpose and its express substantive provisions to support the conclusion that "actual damages" could be proven by competent evidence of mental and emotional injury. App. 8a-14a.

Judge Milan Smith, the author of the panel decision, specifically responded to these criticisms in a concurrence in the order denying rehearing en banc, noting that the panel's decision was consistent with controlling precedents, supported by multiple parts of the statutory text, and in harmony with this Court's reasoning in *Doe v. Chao*. App. 3a-8a.

Petitioners continue to claim that only those who can prove pecuniary losses may bring a private cause of action under §§ 552a(g)(1)(C) or (D), reprising the arguments raised below in support of rehearing and rehearing en banc. However, for multiple reasons, petitioners' contentions about the statute and the court of appeals' decision do not merit further review.

REASONS FOR DENYING THE PETITION

I. The Case Is In An Interlocutory Posture.

To begin with, the petition should be denied because this case is in an interlocutory posture. The court of appeals reversed the district court's summary judgment in favor of petitioners and remanded for further proceedings consistent with its opinion. On remand, further litigation will be necessary concerning: (1) whether petitioners' unlawful conduct was intentional or willful within

the meaning of § 552a(g)(4); (2) the sufficiency of the evidence of Mr. Cooper's mental and emotional injuries; and (3) the proper amount of any compensatory award for those injuries. These proceedings will involve *factual findings* that are likely to shed additional light on the nature, severity, and tangible consequences of Mr. Cooper's mental and emotional injuries and lead to a final adjudication of his Privacy Act claim.

Moreover, if Mr. Cooper loses on remand on any of the above grounds, the question presented in this case effectively would be moot and further consideration of the question could wait until an appropriate case arises in the future. *See* App. 19a, 36a. By the same token, if Mr. Cooper prevails and obtains a judgment in his favor on his Privacy Act claim, petitioners will be able to file a single appeal and, if necessary, a single petition for a writ of certiorari that raises the question presented, along with any other issue that may arise as a result of additional proceedings below, on a more thoroughly developed record. *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that the Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

Because of the interlocutory posture of this case, there is no reason for this Court to grant certiorari now. Indeed, the last time a party filed a petition for a writ of certiorari raising this issue in a case that was in an interlocutory posture, the government argued expressly that "[t]he interlocutory posture of [that] case 'alone furnishe[d] sufficient ground for the denial of' the petition for a writ of certiorari." *See*

Brief for the Federal Respondents in Opposition, *Perkins v. Dep't of Veterans Affairs*, No. 09-513, 2010 WL 361302, at *5-6 & n.1 (Jan. 29, 2010) (quoting *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), and *VMI v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari)). The same argument applies here with equal or greater force.

II. The Circuit Split Described In The Petition Has Existed For More Than 27 Years Without Any Demonstrable, Practical Effect On Privacy Act Claims Against The Government, Much Less The Dire Consequences That Petitioners Claim Will Follow.

Petitioners argue that a grant of certiorari is warranted primarily because the panel's decision extends an "existing division among the courts of appeals" on the question presented and threatens to cause a drain on the public fisc by "greatly increas[ing]" the government's potential litigation costs and liabilities under the Privacy Act. Pet. 11, 17-22. While it is true that the panel decision adds to a previously existing division among the courts of appeals on the question presented, petitioners overstate the practical significance of the circuit split and the likely effect of the panel decision on future litigation under the Act.

To begin with, the precise definition of "actual damages" is relevant in only very narrow circumstances where an individual is able to prove by competent evidence that the government has (1) violated specific record-keeping and confidentiality

provisions of the Privacy Act, (2) "acted in a manner that was intentional or willful," (3) proximately caused either an "adverse determination" concerning the "character, rights, opportunities of, or benefits to [an] individual" or some other "adverse effect" sufficient to satisfy the injury-in-fact requirement of Article III. *Doe*, 540 U.S. at 618-19, 629 (summarizing 5 U.S.C. §§ 552a(g)(1)(C)-(D) and (g)(4)), and (4) has suffered demonstrable emotional distress.

In addition, because of these express statutory requirements, disputes over how to define and prove "actual damages" have arisen infrequently and have never had any great practical significance for the litigation or adjudication of a significant number of Privacy Act claims.

For example, in the 37 years since the Privacy Act was passed in 1974, only four circuit courts (including the court below) have had to decide the specific question presented in this case. *See Fitzpatrick v. IRS*, 665 F.2d 327, 329-31 (11th Cir. 1982) (holding that "actual damages" are limited to proven pecuniary losses); *Johnson v. IRS*, 700 F.2d 971, 972 (5th Cir. 1983) (holding that "actual damages" may be established by evidence of either pecuniary or nonpecuniary injuries); *Hudson v. Reno*, 130 F.3d 1193, 1206-07 (6th Cir. 1997) (holding that "actual damages" may be established only by evidence of out-of-pocket losses).

In 2004 in *Doe*, this Court noted the existence of a longstanding conflict over the precise definition of "actual damages," but it declined to resolve the conflict because the issue was not raised in the certiorari petition and because the Fourth Circuit

had found that Doe had failed to proffer sufficient evidence of *any* injury (either pecuniary or nonpecuniary) arising from the alleged Privacy Act violation. 540 U.S. at 627 n.12.

Since *Doe*, the split has continued to exist, but the issue arises only infrequently and has little practical significance in most Privacy Act cases. *See also Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375 (5th Cir. 2008) (noting that there had been no intervening change in the law since the early 1980s warranting reconsideration of circuit precedent on the meaning of actual damages); *Fanin v. U.S. Dep't of Veterans Affairs*, 572 F.3d 868 (11th Cir. 2009) (same), *cert. denied sub nom. Perkins v. Dep't of Veterans Affairs*, 130 S. Ct. 1755 (2010).

The reality thus is that the split identified in *Doe* and described in the petition now has existed for more than 27 years. For that entire time, individuals in the Fifth Circuit have been able to sue federal agencies for willful or intentional violations of the Privacy Act and use evidence of mental and emotional distress to prove "actual damages" under the Act. However, none of the threats or problems envisioned by the petitioners has materialized. Simply put, there is no evidence of the circuit split described in the petition having any demonstrable, practical effect on the number of cases brought under the Privacy Act, on the types of relief requested by Privacy Act plaintiffs, on the litigation costs incurred by the government, or on settlements or monetary awards to parties claiming any injury as a result of intentional or willful Privacy Act violations. Nor is there any reason to believe that such problems will materialize now on account of the court of appeals' decision in this case.

Moreover, the last time a party filed a petition for a writ of certiorari concerning the specific question presented in this case, the government urged the Court to deny the petition in part because the split among the circuit courts was "narrower" than the petitioner suggested and had "existed for more than 25 years." *See* Brief for the Federal Respondents in Opposition, *Perkins*, No. 09-513, 2010 WL 361302, at *11-14. Tellingly—in 2010—the government did not claim that the existing split was having *any* serious adverse consequences for the government, even though the Fifth Circuit had ruled and recently re-affirmed that "actual damages" could be established through competent proof of mental and emotional distress.

Finally, petitioners describe the government's opposition to the *Perkins* petition as a position it took before the panel issued its decision in this case. However, the record shows that the panel's original decision in this case was entered before this Court ruled on the *Perkins* petition, that the government provided the Court with a copy of the panel's original decision on the day that the decision was entered, and that the government continued to oppose the *Perkins* petition for the reasons just noted, notwithstanding the panel's decision in this case. *See* Docket, *Perkins v. Dep't of Veterans Affairs*, No. 09-513. And the *Perkins* petition was denied, notwithstanding the existence of the precise circuit split that petitioners now ask this Court to resolve.

Nothing of substance has happened since the *Perkins* petition was denied, and there remains no compelling reason for this Court to devote its resources to resolving the question presented.

III. The Circuit Split Described In The Petition Is Not As Entrenched Or Ripe For Review As The Petition Suggests.

Petitioners also overstate the matter when they claim that the circuit split that exists concerning the precise definition of "actual damages" is entrenched and ripe for this Court's review. Pet. 18-19.

Prior to the court of appeals' decision in this case, no court of appeals ever had engaged in a comprehensive analysis of the entire Privacy Act and the full panoply of sources of information about the term "actual damages." The Eleventh and Sixth Circuits embraced the petitioners' narrow construction of actual damages but did so in a perfunctory manner. The Eleventh Circuit's decision in *Fitzpatrick* consists of a single paragraph asserting that "actual damages" has no plain meaning, followed by a two-page analysis of legislative history that has been described as patently flawed by multiple courts. 665 F.2d at 329-31. The Sixth Circuit's analysis in *Hudson* is no broader: it consists of eight sentences—five following *Fitzpatrick* and three noting disapproval of the Fifth Circuit's decision in *Johnson* based upon the sovereign immunity canon. 130 F.3d at 1207 & n.11.

In contrast to the decisions of the Eleventh and Sixth Circuits, the panel's decision in this case thoroughly examines: (1) the full text of the Privacy Act, including the plain meaning of the term "actual damages," the Act's express statement of purpose, and other substantive and remedial provisions of the Act; (2) common law tort principles and relevant precedents from this Court concerning invasions of

privacy and defamation; (3) other federal statutes in existence at the time of the Act's passage providing relief for "actual damages" sustained due to invasions of privacy; (4) legislative history; (5) the canon of sovereign immunity; and (6) the arbitrary distinctions and results that would follow from a narrow construction limiting "actual damages" to proven pecuniary losses.

The petition, therefore, is unfair when it contends that the panel's decision "deepens" and "entrenche[s]" the existing circuit split. Rather, the panel's fresh and comprehensive analysis of the issue considers new arguments and authorities that no court of appeals previously has considered. This Court's consideration of the question presented, accordingly, should wait until other circuit courts have considered these new arguments and authorities in future cases. If the split continues and begins to have a demonstrable effect on a significant number of cases, then this Court can consider the question presented in light of such further developments in an appropriate case.

IV. The Court Of Appeals Correctly Concluded That Evidence Of Mental And Emotional Distress Can Be Used To Establish "Actual Damages" Caused By An Intentional Or Willful Violation Of The Privacy Act.

In any event, this Court's review is not warranted because the court of appeals reached the correct result in an opinion that exhaustively and thoughtfully considers the full text of the Privacy Act and all sources and tools relevant to determining the meaning of the Act. Contrary to the petition, each

step taken by the court of appeals is firmly grounded in the Act's text and controlling precedent.

A. The Court Of Appeals Properly Examined The Full Text Of The Privacy Act And All Sources And Tools Relevant To The Construction Of "Actual Damages."

In this case, the court of appeals started on solid ground by reiterating the indisputable objective of statutory interpretation—"to discern the intent of Congress in enacting [the] particular statute." App. 22a (internal quotations and citations omitted). The court also finished on equally solid ground by discerning that intent primarily from the Act's text, read in its entirety with each part helping to inform the other.

To that end (and in keeping with numerous precedents), the court looked first to the plain meaning of the term "actual damages" in isolation, drawing on the "ordinary, contemporary, common meaning" of the words as defined in dictionaries and other objective authorities. *Id.* (citations omitted).

The court also considered the plain meaning of "actual damages" "in its statutory context, looking to the language of the entire statute, its structure, and purpose." App. 24a. The court of appeals noted that Section 2 of the Act includes an *express* statement of Congress's purpose in providing a private cause of action for monetary damages for an intentional or willful violation of various record-keeping requirements:

> [T]o provide certain safeguards for an individual against an invasion of personal privacy by requiring federal agencies ...to ... be subject to civil suit for *any damages* which occur as a result of willful or intentional action which violates any individual's rights under this Act.

App. 24a-25a (quoting Privacy Act of 1974, Pub. L. 93-579, § 2(b)(6), 88 Stat. 1896 (Dec. 31, 1974)) (emphasis in the panel opinion).

And, the court of appeals further observed that, in the Act's substantive and remedial provisions, Congress "signaled its intent ... to extend monetary recovery beyond pure economic loss" by (1) instructing federal agencies to establish safeguards to "protect" against, inter alia, "substantial harm, *embarrassment*, *inconvenience*, or *unfairness* to any individual on whom information is maintained" and (2) providing a civil remedy, expressly including monetary relief for "actual damages," in cases where the agency's failure to provide safeguards against "substantial harm, embarrassment, inconvenience, or unfairness" is found to be "intentional or willful" and to have proximately caused either an "adverse determination" concerning "the *character*, rights, opportunities of, or benefits to [an] individual" or some other "adverse effect" sufficient to satisfy the injury-in-fact requirement of Article III. App. 26a (quoting 5 U.S.C. §§ 552a(e)(10) and (g)(1)(C) (emphasis in the panel opinion)).[2]

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[2] The court also considered the legislative history of the Act but found it "murky, ambiguous, and contradictory." App. 28a-29a (internal quotations omitted). The court's decision to rely on the

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Further, the court of appeals considered two other important sources of information about the meaning of "actual damages:" (1) precedents of this Court concerning invasions of privacy and defamation and (2) the civil remedies provisions of other privacy protecting statutes enacted prior to 1974.

Seven years before the Privacy Act was enacted, in *Time, Inc. v. Hill*, this Court held that "mental distress" and other types of nonpecuniary harm are the "primary" type of damage in invasion-of-privacy cases. 385 U.S. 374, 386 n.9 (1967). Several years later, in *Gertz v. Robert Welch, Inc.*, a case that was decided shortly before the Privacy Act was enacted, the Court held that awards of presumed damages to plaintiffs suing the media for defamation would be unconstitutional in the absence of "actual malice" but that "compensatory damages" could be awarded for any "*actual injury*"—including mental distress, humiliation, embarrassment, and other nonpecuniary injuries proven by "competent evidence." 418 U.S. 323, 373 (1974) (emphasis added) (recognizing that these nonpecuniary injuries are the "natural or probable consequences of the wrongful conduct").

There is more. Prior to the passage of the Privacy Act, Congress used the term "actual damages" in other federal statutes to provide a remedy for both

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Act's text, rather than its legislative history, was well supported by this Court's precedents, even though the drafting history of the statute further supports the conclusion that Congress used the term "actual damages" in a manner synonymous with ordinary "compensatory damages" and in contrast to punitive and nominal damages. *See Johnson*, 700 F.2d at 974-83.

pecuniary and nonpecuniary harm. *See* App. 29a-32a (citing cases construing "actual damages" under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681n and 1681o, and the Fair Housing Act, 42 U.S.C. § 3612(c), as including mental and emotional distress).

Thus, the court of appeals here correctly presumed that, when Congress provided monetary awards for "actual damages" caused by an intentional or willful violation of the Privacy Act's safeguards, it was aware of this Court's decisions in *Time, Inc.* and *Gertz*, as well as the construction given to the term "actual damages" in cases under the Fair Housing Act, and the use of the same term in the Fair Credit Reporting Act. *See, e.g.*, *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) (Congress legislates with full recognition of existing jurisprudence); *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion) ("when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes").

In sum, based on the Act's structure, its purpose, and the relevant law as applied to both, the court of appeals properly rejected the government's narrow construction of the term "actual damages" and correctly held that Congress clearly intended "actual damages" to encompass both pecuniary and nonpecuniary injuries. App. 36a-37a.

B. Petitioners' Criticisms Of The Court Of Appeals' Decision Do Not Merit Further Review By This Court.

Petitioners disagree with the court of appeals' decision, but they do not raise any issue that merits further review by this Court.

For instance, petitioners are wrong when they contend that the court of appeals failed to adhere to the sovereign immunity canon. Pet. 11. The court of appeals' decision acknowledges and applies this Court's precedents concerning the sovereign immunity canon. While this Court often has said that waivers of sovereign immunity must be expressed clearly in statutory text, the Court also repeatedly has warned federal district courts and courts of appeals that express waivers of immunity (like the one found in the Privacy Act) must be construed in a way that reflects "a realistic assessment of legislative intent" in light of full text of the statute in question and the "underlying congressional policy" that the statute aims to advance. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990); *Franchise Tax Bd. of California v. U.S. Postal Serv.*, 467 U.S. 512, 521 (1984). And the Court further has cautioned that federal judges should not "assume the authority to narrow the waiver that Congress intended" or act as "self-constituted guardian[s] of the Treasury to import immunity back into a statute designed to limit it. *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979); *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69, (1955). Indeed, this Court's decision in *Doe* illustrates how the sovereign immunity canon does not control the construction of the express civil remedies established by the Privacy Act. 540 U.S. at 620-27 (construing §§ 552a(g)(1)(C) and (D) and (g)(4)

without any reference to the sovereign immunity canon). The court of appeals followed this Court's guidance closely.

Petitioners likewise are mistaken when they contend that the court of appeals erred in placing "significant weight" on the Act's statement of Congressional findings and purpose, its substantive requirements, and its remedial provisions. Pet. 14-15. The Act contains an express waiver of sovereign immunity. To determine the scope of that express waiver, the precedents of this Court cited in the preceding paragraph plainly require that the phrase "actual damages" be evaluated in context in light of the full text of the Act and all other sources of meaning and tools of construction. That is precisely what the court of appeals did here.

Nor is there any merit to the petitioners' contention that the court of appeals conflated the Act's "adverse effect" and "actual damages" provisions or contravened this Court's decision in *Doe*. The court of appeals' decision follows *Doe* closely and construes "adverse effect" and "actual damages" in harmony with one another, and Congress's "overall objective" in §§ 552a(g)(1)(C)-(D) and (g)(4), by allowing a plaintiff "who demonstrates a nonpecuniary adverse effect" to have an opportunity to recover damages "to the extent the plaintiff can proffer the requisite degree of competent evidence that there is a real and tangible nonpecuniary injury." App. 7a (noting that under petitioners' unduly restrictive construction of the "actual damages" a plaintiff would have nominal standing to sue but still be subject to dismissal for failure to state a claim upon which relief could be granted).

The petitioners similarly miss the mark when they fault the court of appeals for relying on the FCRA as support for its construction of actual damages. It was reasonable and appropriate for the panel to consider the FCRA when construing the Privacy Act. The FCRA was enacted four years before the Privacy Act, protects the same individual interests in confidentiality in record-keeping, includes a civil remedy allowing for the recovery of "actual damages," and has been uniformly construed to permit recovery for proven mental and emotional distress. *See supra* pp. 20-21.

Finally, petitioners fail to explain why it would be reasonable to restrict "actual damages" to pecuniary losses in this context. The only authority that they cite to support the reasonableness of such a restrictive construction is a report to Congress three years after the Privacy Act was passed which opined that "there is no generally accepted definition of 'actual damages' in American law" and that "actual damages" was "intended as a synonym for special damages." Privacy Protection Study Commission, *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* 530 (GPO 1977), *cited in* Pet. 13, 16-17.

The court of appeals properly considered and rejected that report, however. The report's conclusions about "actual damages" in this context were not supported by *any* citation to a case, statute, dictionary, treatise, or other legal authority purporting to define "actual" or "damage" or "actual damages;" nor did the report provide any detailed analysis of the Act's legislative history, the precedents of this Court, or other federal statutes. *Id.*

CONCLUSION

Here, it is apparent that Congress unequivocally provided Mr. Cooper with a civil remedy against petitioners for his injuries. He should be allowed to proceed to trial where his claim may be developed and adjudicated.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

RAYMOND A. CARDOZO
Counsel of Record
JAMES M. WOOD
JAMES C. MARTIN
DAVID J. BIRD
TIFFANY RENEE THOMAS
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
(415) 543-8700
rcardozo@reedsmith.com

Attorneys for Respondent

May 16, 2011

REPLY BRIEF

No. 10-1024

In the Supreme Court of the United States

FEDERAL AVIATION ADMINISTRATION, ET AL.
PETITIONERS

v.

STANMORE CAWTHON COOPER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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STANMORE CAWTHON COOPER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

The Ninth Circuit held in this case that by authorizing the recovery of "actual damages" for certain violations of the Privacy Act, 5 U.S.C. 552a(g)(4)(A), Congress waived the United States' sovereign immunity to claims of nonpecuniary harm. As the eight judges dissenting from the denial of rehearing en banc observed, the panel reached that conclusion "even though the opinion itself admits" that the term "actual damages" is "not defined in the statute, has no plain meaning, has no fixed legal meaning, and indeed, is a 'chameleon.'" Pet. App. 9a (O'Scannlain, J., dissenting from denial of rehearing en banc) (citation omitted). In the absence of the requisite clear textual statement, see, *e.g.*, *Lane* v. *Pena*, 518 U.S. 187, 192 (1996), the panel instead inferred the sovereign-immunity waiver from "abstract legislative intent and an interpretation of the Privacy Act that the Supreme Court recently rejected in *Doe* v.

Chao, 540 U.S. 614 [(2004)]." Pet. App. 9a (O'Scannlain, J., dissenting from denial of rehearing en banc). The decision thus contravenes both this Court's sovereign-immunity jurisprudence and its Privacy Act jurisprudence, widens a recognized circuit conflict, and exposes the government to uncapped emotional-distress damages and heightened litigation costs throughout the Ninth Circuit. This Court's review is warranted.

1. Respondent acknowledges (Br. in Opp. 12-17) the existence of a circuit conflict on the question presented. See Pet. 17-19; compare Pet. App. 14a-15a (nonpecuniary harm recoverable); *Jacobs* v. *National Drug Intelligence Ctr.*, 548 F.3d 375, 377 (5th Cir. 2008) (same), with *Fanin* v. *United States Dep't of Veterans Affairs*, 572 F.3d 868, 872 (11th Cir. 2009), cert. denied sub nom. *Perkins* v. *Department of Veterans Affairs*, 130 S. Ct. 1755 (2010) (nonpecuniary harm not recoverable); *Hudson* v. *Reno*, 130 F.3d 1193, 1207 (6th Cir. 1997) (same), cert denied, 525 U.S. 822 (1998) (not presenting this issue), abrogated in part on other grounds by *Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001). Respondent suggests (Br. in Opp. 16-17), however, that the conflict is not "ripe" for review, because other courts of appeals may reconsider their views in light of the Ninth Circuit's decision. That suggestion is wrong. It presupposes three premises—(1) that courts of appeals are likely to revisit the issue, (2) that they are likely to be persuaded by the Ninth Circuit's conclusion, and (3) that the Ninth Circuit's conclusion is sound—each of which is incorrect.

First, courts of appeals on both sides of the conflict have declined to reevaluate their precedents. See Pet. App. 2a (denying rehearing en banc); *Fanin*, *supra* (No. 08-11102 Docket entry (11th Cir. Aug. 5, 2009)) (same); *Jacobs*, *supra* (No. 07-40776 Docket entry (5th Cir. Jan. 6, 2009)) (same);

see also Pet. 18-19 (noting that the Fifth Circuit panel in *Jacobs*, 548 F.3d at 378, declined to decide whether its earlier examination of the issue was consistent with this Court's current sovereign-immunity jurisprudence). Second, the panel opinion in this case, which was repudiated by a substantial number of judges on the Ninth Circuit itself, is unlikely to provide a persuasive model for the other courts of appeals that have already rejected recovery for nonpecuniary harm. Pet. App. 8a-13a. Third, for reasons stated in the petition (Pet. 12-17) and below (pp. 7-11, *infra*), the panel's opinion adopts an incorrect interpretation of the Privacy Act, so the problem would only be compounded in the unlikely event that those other circuits reversed field.

Respondent also asserts (Br. in Opp. 12-15) that the conflict is unimportant, because the issue of recovery for nonpecuniary harm "arises only infrequently and has little practical significance in most Privacy Act cases." But the number of appellate cases addressing the issue (*id.* at 13-14) is an inappropriate measure of its frequency or significance. In the experience of the Department of Justice, which is responsible for the defense of all Privacy Act claims, the issue comes up in nearly every case, but generally plays out under the appellate radar. This Office has been informed that, unless affirmatively precluded by circuit precedent from doing so, most plaintiffs filing a 5 U.S.C. 552a(g)(4)(A) suit allege both pecuniary damages and nonpecuniary mental and/or emotional distress. District courts rarely dispose of the damages issue before the close of discovery. The government therefore must prepare for the contingency that emotional distress will be at issue, typically by hiring a psychological expert, moving for an independent medical examination, and deposing the plaintiff's treating doctor or psychologist. And despite all of the

effort required for the government to defend against allegations of nonpecuniary harm in the district court, a variety of circumstances can prevent the legal issue of whether such harm is compensable at all under the Act from reaching the court of appeals. The government may, for example, prevail on other grounds at summary judgment, disprove the allegations at trial, lose at trial in a circuit where the settled law is unfavorable to the government, or opt not to seek appellate review for other reasons.

Respondent attempts (Br. in Opp. 15) to downplay the importance of the issue of nonpecuniary Privacy Act damages by noting that the government opposed certiorari in *Perkins* v. *Department of Veterans Affairs*, 130 S. Ct. 1755 (2010) (No. 09-513), which presented this issue. The government's brief in *Perkins*, however, did not deny the issue's general practical significance, but instead opposed certiorari for other reasons (namely, that the circuit conflict at that time was narrower and the case was an inappropriate vehicle for resolving it). 09-513 Br. in Opp. 5-14. The government expressly reserved the possibility that the "currently narrow conflict in the circuits would warrant this Court's resolution in an appropriate case in the future." *Id.* at 14. After the *Perkins* brief was filed, this case was decided by the Ninth Circuit (the Nation's largest geographic circuit), which joined the Fifth Circuit in holding that the Privacy Act waives sovereign immunity for claims of nonpecuniary harm. The government informed the Court of that development by letter and noted that it was considering whether to seek rehearing en banc of the Ninth Circuit panel's decision. 09-513 Docket entry (Feb. 23, 2010). The government did later seek rehearing en banc; the court of appeals denied it (over the dissent of eight judges); and now review by this Court is the only remaining way to cor-

rect the Ninth Circuit's error and resolve the expanding circuit conflict.

2. Respondent also argues (Br. in Opp. 10-12) that certiorari is unwarranted because, as the case currently stands, further district-court proceedings would be necessary to determine whether the government ultimately would be liable to pay respondent's asserted emotional-distress damages. The interlocutory posture of this particular case, however, poses no impediment to this Court's review. See Eugene Gressman et al., *Supreme Court Practice* 281 (9th ed. 2007) (when "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status"); *id.* at 282-283 (citing examples). This case, which presents a pure question of law that otherwise would meet the criteria for certiorari and on which the viability of respondent's entire lawsuit turns, is the rare type of case that this Court should hear on an interlocutory basis. The answer to the question of law that is presented would be unaffected by any additional "factual findings" (Br. in Opp. 11 (emphasis omitted)) that the district court might make. And denying certiorari now would serve only to delay review and prolong the negative consequences of the court of appeals' decision. See *Supreme Court Practice* 282 ("In some instances, the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation.").

A full trial in this case, which would force the government to defend against respondent's uncapped and amorphous mental-distress claims, would be costly and time-consuming. And, as respondent observes (Br. in Opp. 11),

a victory for the government (or a settlement) would preclude this Court from addressing the question presented at a later stage, and would force the government to search for another suitable vehicle. In the meantime, the court of appeals' legal holding would continue to adversely affect the government in virtually every Privacy Act damages suit in the Ninth Circuit and to encourage the filing of additional suits by potential plaintiffs who have suffered little or no pecuniary harm. See Pet. 20-21; pp. 3-4, *supra*. There is no reason to subject the government and the judicial system to these burdens for an indefinite period until another opportunity presents itself for the government to ask this Court to reverse Ninth Circuit's erroneous decision.

These and other circumstances further distinguish this case from *Perkins*, in which the government pointed to the case's interlocutory posture as one reason to deny review. 09-513 Br. in Opp. 5-6. In that case, the court of appeals affirmed summary judgment in favor of the government on a Privacy Act claim as to which the plaintiffs had failed to produce evidence of pecuniary harm. *Id.* at 4-5. However, the court of appeals reinstated several claims arising out of the same governmental conduct as the Privacy Act damages claim. *Id.* at 5-6 & n.1. As a result, further proceedings were required on the additional claims irrespective of the nonpecuniary-harm issue; those further proceedings could have revealed that the plaintiffs' factually related Privacy Act damages claim was meritless regardless of whether nonpecuniary harm is compensable; and the individual plaintiffs lacked any systemic interest in how the Privacy Act is interpreted. *Ibid.* Here, in contrast, resolution of the question presented in the government's favor would completely dispose of the case; further proceedings if certiorari is denied would not eliminate the government's interest in the question presented; and the government

would continue to experience the repercussions of the court of appeals' decision in this and other cases unless and until the Ninth Circuit's decision is reversed.

3. Respondent finally argues (Br. in Opp. 17-24) that certiorari is unwarranted because the Ninth Circuit reached the correct result. To the extent that respondent simply defends the court of appeals' opinion, those arguments lack merit for the reasons explained in the petition. See Pet. 12-17. But respondent also introduces arguments that go further than—and in several instances conflict with—the court of appeals' decision. These additional arguments are likewise meritless.

a. First, respondent contends (Br. in Opp. 22-23) that well-settled sovereign-immunity principles "do[] not control the construction of the express civil remedies established by the Privacy Act." He raised a similar argument in the court of appeals, and the panel rejected it. Pet. App. 33a ("[Respondent] contends that the [sovereign-immunity] canon is of no use in construing the meaning of actual damages. [Respondent's] position is not supported by applicable case law."). The panel correctly recognized that "a waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text," *id.* at 32a (quoting *Lane*, 518 U.S. at 192) (brackets omitted); that even where Congress has waived the sovereign immunity of the United States, the same clear-statement rule applies "for purposes of gauging the scope" of that waiver, *id.* at 33a (citing *Lane*, 518 U.S. at 192); and that, as a result, "if actual damages is susceptible of two plausible interpretations, then the sovereign immunity canon requires the court to construe the term narrowly in favor of the Government, holding that nonpecuniary damages are not covered," *id.* at 34a. See also *id.* at 9a-10a (O'Scannlain, J., dissenting from denial of rehearing en banc); Pet. 12. Under these princi-

ples, the Ninth Circuit was required to construe "actual damages" narrowly, to exclude nonpecuniary harm.

This Court reaffirmed those principles earlier this Term in *Sossamon* v. *Texas*, No. 08-1438 (Apr. 20, 2011), a state sovereign-immunity case in which the Court discussed federal sovereign-immunity principles as well. See slip op. 5 & n.4 (citing *Lane*, 518 U.S. at 192, and *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992)). Respondent is accordingly mistaken in suggesting (Br. in Opp. 22) that the Court has watered down the sovereign-immunity canon of construction in any material respect. Respondent is equally mistaken in suggesting (*ibid.*) that this Court's decision in *Doe* v. *Chao* "illustrates" the canon's inapplicability to the civil-remedies provision of the Privacy Act. *Doe* adopted the government's narrow reading of that provision and said nothing about abandoning the sovereign-immunity canon. See 540 U.S. 616-627.

b. Second, respondent implies (Br. in Opp. 20-21) that it was well-established when Congress enacted the Privacy Act, that "actual damages" included nonpecuniary harm. But respondent fails to acknowledge—as the court of appeals, other courts, and the Privacy Protection Study Commission have—that the term "actual damages" has "no plain meaning." Pet. App. 24a; see *id.* at 23a (observing that courts of appeals on both sides of the circuit conflict "agreed that the meaning of the term actual damages is ambiguous"); Privacy Protection Study Comm'n, *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* 530 (1977) (*Privacy Commission Report*); Pet. 12-13. Respondent's contrary arguments purport merely to track the court of appeals' decision, but they in fact go beyond even what the panel was willing to accept. Respondent attempts (Pet. 21), for example, to compare the Privacy Act to the Fair Housing

Act, 42 U.S.C. 3601 *et seq.*, when the court of appeals correctly determined that the two statutes are insufficiently "analogous in time, purpose and subject matter" to allow for a legitimate comparison. Pet. App. 32a n.2.

Even when respondent cites sources relied upon by the court of appeals, he fares no better than the panel in attempting to demonstrate an unequivocal textual commitment to allow Privacy Act suits alleging nonpecuniary harm. The Court's opinions in *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), do not use the term "actual damages," let alone provide a definitive definition. See Br. in Opp. 20. Respondent's (and the court of appeals') reliance on circuit-court opinions interpreting "actual damages" in the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, the earliest of which was decided eight years *after* passage of the Privacy Act, is equally unavailing. See Br. in Opp. 21-22; Pet. App 31a; see also Pet. 16 (describing why the two statutes are substantively different).

If there had in fact been a legal definition of "actual damages" so well-accepted that Congress could not have had anything else in mind, that definition would not have escaped the notice of the Privacy Protection Study Commission, which was established by the Privacy Act specifically to examine (among other things) the issue of damages under the Act. Pub. L. No. 93-579, § 5(c)(2)(B)(iii), 88 Stat. 1907. The Commission found, like the court of appeals here, "that there is no generally accepted definition of 'actual damages' in American law." *Privacy Commission Report* 530; see Pet. App. 24a ("[T]here is no plain meaning to the term actual damages, as used in the [Privacy] Act."). The Commission's 1977 report, moreover, went on to conclude that the term, as used in the Act, was "meant to restrict recovery to specific pecuniary losses," *Privacy Com-*

mission Report 530—the precise definition that respondent seeks to repudiate.

c. Finally, respondent questions (Br. in Opp. 24) the "reasonableness" of limiting monetary remedies under the Privacy Act to pecuniary harm. If he means to suggest that there is no legal precedent for such a definition of "actual damages," the suggestion is at odds with the panel's opinion (see Pet. App. 22a-24a) and overlooks numerous sources. See, *e.g.*, *Mackie* v. *Rieser*, 296 F.3d 909, 917 (9th Cir. 2002) (interpreting "actual damages" under Copyright Act to cover only economic damages), cert. denied, 537 U.S. 1189 (2003); *Ryan* v. *Foster & Marshall, Inc.*, 556 F.2d 460, 464 (9th Cir. 1977) (same under Securities Exchange Act) (cited at Pet. App. 23a); *Guzman* v. *Western State Bank*, 540 F.2d 948 (8th Cir. 1976) (using "actual damages" to mean "out-of-the-pocket pecuniary loss" but not "emotional and mental distress"); *Morvant* v. *Lumbermens Mut. Cas. Co.*, 429 F.2d 495, 496 (5th Cir. 1970) (using "actual damages" to refer to medical expenses and lost wages, as distinct from "pain and suffering"); *Black's Law Dictionary* 467-468 (Rev. 4th ed. 1968) (providing definition of "actual damages" expressly distinguishing them from "exemplary damages," which "are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong"); 25 C.J.S. *Damages* § 3 (2011) (observing that "actual damages" can be used to mean "determinate pecuniary loss"); *Privacy Commission Report* 530.

If respondent instead means to suggest that it would have been unreasonable for Congress to have intended the narrower definition of "actual damages" in the context of the Privacy Act, he fails to account for the public interest in (among other things) avoiding uncapped federal liability, filtering out non-credible claimants by requiring proof of

pecuniary losses, and assuring that damages claims are concrete and measurable. Because the narrower definition is, at a bare minimum, "plausible," the Ninth Circuit erred in construing the Privacy Act's sovereign-immunity waiver more broadly. *Nordic Village, Inc.*, 503 U.S. at 37.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

MAY 2011

PETITIONER'S BRIEF

No. 10-1024

In the Supreme Court of the United States

FEDERAL AVIATION ADMINISTRATION, ET AL.,
PETITIONERS

v.

STANMORE CAWTHON COOPER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ERIC J. FEIGIN
Assistant to the Solicitor General

MARK B. STERN
SAMANTHA L. CHAIFETZ
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a plaintiff who alleges only mental and emotional distress can establish "actual damages" within the meaning of the civil-remedies provision of the Privacy Act, 5 U.S.C. 552a(g)(4)(A).

PARTIES TO THE PROCEEDING

Petitioners are the Federal Aviation Administration, the Social Security Administration, and the United States Department of Transportation. Respondent is Stanmore Cawthon Cooper.

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In the Supreme Court of the United States

No. 10-1024

FEDERAL AVIATION ADMINISTRATION, ET AL.
PETITIONERS

v.

STANMORE CAWTHON COOPER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14a-37a) is reported at 622 F.3d 1016, amending and superseding on denial of rehearing the opinion reported at 596 F.3d 538. The order of the district court (Pet. App. 38a-64a) is unreported.

JURISDICTION

The original judgment of the court of appeals was entered on February 22, 2010. The court of appeals denied the government's petition for rehearing or rehearing en banc, and issued an amended opinion, on September 16, 2010 (Pet. App. 1a-37a). On December 6, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including Janu-

ary 14, 2011. On January 12, 2011, Justice Kennedy further extended the time to and including February 13, 2011, which is a Sunday, and the petition was filed on February 14, 2011 (Monday). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The civil-remedies provision of the Privacy Act of 1974, 5 U.S.C. 552a(g), provides in relevant part:

> (1) CIVIL REMEDIES. Whenever any agency
>
> * * * * *
>
> (D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,
>
> the individual may bring a civil action against the agency * * *.
>
> * * * * *
>
> (4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

Other relevant provisions of the Privacy Act, including the full text of Section 552a, are reproduced in full in the petition appendix. Pet. App. 65a-109a.

STATEMENT

1. The Privacy Act of 1974, portions of which are codified at 5 U.S.C. 552a, sets forth requirements for Executive Branch agencies in their collection, maintenance, use, and dissemination of "records" containing information about an "individual," when those records are maintained as part of a "system of records." 5 U.S.C. 552a(a)(1)-(5) and (b); see generally Pub. L. No. 93-579, 88 Stat. 1896. The Act requires, for example, an agency to maintain records that are used to make "determination[s]" about "individual[s]" with "such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. 552a(e)(5). The Act also requires that, except in certain specified circumstances, "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person" without a request by or consent from "the individual to whom the record pertains." 5 U.S.C. 552a(b).

The Act authorizes private civil actions, as well as criminal prosecutions, to enforce its terms. 5 U.S.C. 552a(g) (civil remedies); 5 U.S.C. 552a(i) (criminal enforcement). A violation of some provisions entitles a civil plaintiff only to declaratory or injunctive relief. 5 U.S.C. 552a(g)(2)-(3) (authorizing only injunctive relief, plus fees and costs, for failure to correct a record or to provide an individual with access to his records). Viola-

tions of other provisions, including the disclosure-related provision at issue in this case, may also entitle a plaintiff to an award of money damages against the government. 5 U.S.C. 552a(g)(4).

The subsection that allows civil actions for disclosure-related and certain other violations requires a plaintiff to show, as a prerequisite to suit, that the violation occurred "in such a way as to have an adverse effect on" him. 5 U.S.C. 552a(g)(1)(D). Plaintiffs seeking damages must satisfy additional prerequisites. The plaintiff must demonstrate both that the violation was "intentional or willful" and that he sustained "actual damages * * * as a result of" the violation. 5 U.S.C. 552a(g)(4)(A); see *Doe* v. *Chao*, 540 U.S. 614, 624-625 (2004). If those elements are satisfied, the Act subjects the government to liability for the amount of "actual damages sustained by the individual" and provides that "in no case shall a person entitled to recovery receive less than the sum of $1,000." 5 U.S.C. 552a(g)(4)(A); see *Doe*, 540 U.S. at 627; see also 5 U.S.C. 552a(g)(4)(B) (reasonable litigation costs and attorney fees may be awarded to a prevailing plaintiff). The Act does not define the term "actual damages."

2. a. Respondent is a pilot who first obtained a private pilot's certificate from the Federal Aviation Administration (FAA) in 1964. Pet. App. 15a. In order to operate an aircraft, a pilot must have, under FAA regulations, not only a pilot's certificate, but also a valid medical certificate. *Ibid.*; 14 C.F.R. 61.3(a) and (c). Those regulations further require a pilot periodically to renew his medical certificate and to disclose in his renewal application any medical conditions he has had and any medications he is taking. Pet. App. 15a; 14 C.F.R. 61.23(d); 14 C.F.R. Pt. 67.

In the mid-1980s, respondent learned that he was HIV-positive and began taking antiretroviral medication. Pet. App. 15a-16a. He knew that he would not at that time have qualified for renewal of his medical certificate if he admitted his condition. *Ibid.* He nevertheless applied for and received a medical certificate in 1994 without disclosing his HIV status or that he was taking the medication. *Id.* at 16a.

For a period of time in the mid-1990s, respondent's HIV symptoms worsened to the point of creating a disability. Pet. App. 16a. In 1995, he applied for long-term disability benefits from the Social Security Administration (SSA). *Ibid.*; see generally 42 U.S.C. 401 *et seq.* (providing, in Title II of the Social Security Act, for disability benefits for wage earners who satisfy specified qualifications). He disclosed his HIV-positive status on his application. Pet. App. 16a. The SSA granted respondent's application and paid him disability benefits until his health improved and he discontinued the benefits. *Ibid.*; *id.* at 39a.

Before applying for a medical certificate in 1998, petitioner became aware that the FAA had begun to grant medical certificates to HIV-positive pilots on a case-by-case basis through a "special issuance" procedure. Pet. App. 114a. He nevertheless chose not to seek a special-issuance certificate and instead applied for and obtained a medical certificate four additional times—in 1998, 2000, 2002, and 2004—without disclosing his actual medical condition. *Id.* at 114a-115a.

b. Respondent's deception was uncovered in 2005 as a result of "Operation Safe Pilot," a joint criminal investigation by the offices of inspector general of the SSA and the FAA's parent agency, the Department of Transportation (DOT). Pet. App. 17a-18a. The inspectors

general of those agencies are law enforcement officers tasked with the responsibility for uncovering and preventing waste, fraud, or abuse in the agencies' programs or operations. Inspector General Act of 1978, 5 U.S.C. App. § 2; 5 U.S.C. App. §§ 4, 6 (2006 & Supp. III 2009); 42 U.S.C. 902; 49 U.S.C. 354.

Operation Safe Pilot was prompted by the discovery that a California pilot had consulted two sets of doctors in a scheme to obtain medical certification to fly while also receiving disability benefits. Pet. App. 16a-17a. Concerned that such fraud might be more widespread, the inspectors general decided to investigate the veracity of medical information submitted by persons in northern California who had successfully applied for both certification to fly and disability benefits. *Id.* at 17a. The DOT provided the SSA with the names, dates of birth, social security numbers, and genders of 45,000 licensed pilots with current medical certificates in northern California. *Ibid.* The SSA compared the list with its own records of benefits recipients and summarized the results in spreadsheets, which it provided to the DOT. *Ibid.*

When agents from the DOT and SSA examined the spreadsheets, they discovered that respondent was a licensed pilot with a current medical certificate but had received disability benefits. Pet. App. 17a-18a. FAA flight surgeons reviewed respondent's FAA medical file and SSA disability file and concluded that respondent would not have received an unrestricted medical certificate if his true medical condition had been known. *Id.* at 18a.

When confronted with this information, respondent admitted that he had intentionally withheld his HIV status and related medical information from the FAA. Pet.

App. 18a. His pilot's license was revoked because of his misrepresentations, and he was indicted on three counts of making false statements to a government agency, in violation of 18 U.S.C. 1001. *Ibid.* Respondent eventually pleaded guilty to one count of making and delivering a false official writing, in violation of 18 U.S.C. 1018. *Ibid.* He was sentenced to two years of probation and fined $1000. *Ibid.*

3. Respondent thereafter filed suit in the District Court for the Northern District of California against the FAA, SSA, and DOT, claiming that the agencies willfully or intentionally violated the Privacy Act by sharing records as part of Operation Safe Pilot. Pet. App. 19a; see 28 U.S.C. 1331. He alleged that the information sharing, which revealed his HIV status to the FAA, "caused him 'to suffer humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress,'" and he sought recovery for those asserted emotional harms. Pet. App. 19a. Respondent did not, however, allege any direct or indirect pecuniary loss. *Id.* at 15a.

The district court granted summary judgment for the government. Pet. App. 38a-64a. The court believed that Operation Safe Pilot had violated the Privacy Act (*id.* at 51a-58a) and that respondent had raised a triable issue as to whether the violation was intentional or willful (*id.* at 58a-59a). But the court concluded that respondent had failed to make out a claim for "actual damages." *Id.* at 59a-64a. Observing that principles of sovereign immunity require strict construction of the Privacy Act's "actual damages" provision, 5 U.S.C. 552a(g)(4)(A), the court held that the provision cannot be satisfied where only nonpecuniary harm, such as mental distress, is alleged. Pet. App. 61a-64a. The court

concluded that "the term 'actual damages' is facially ambiguous" (*id.* at 61a) and reasoned that "ambiguity as to whether 5 U.S.C. § 552a(g)(4)(A)'s provision for actual damages includes mental distress without evidence of pecuniary damages must be resolved in favor of the government defendants" (*id.* at 63a).

4. A panel of the court of appeals for the Ninth Circuit reversed and remanded. Pet. App. 14a-37a (amended panel opinion).

The court of appeals agreed with the district court that, because the term "actual damages" appears in the context of a provision that waives federal sovereign immunity, "any ambiguities in the statutory text * * * must be strictly construed in favor of the sovereign." Pet. App. 32a (citing *Lane* v. *Peña*, 518 U.S. 187, 192 (1996)). "[I]f actual damages is susceptible of two plausible interpretations," the court explained, "nonpecuniary damages are not covered." *Id.* at 34a; see also *id.* at 33a (discussing *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30 (1992)).

The court of appeals departed from the district court, however, in its application of the sovereign-immunity canon. The court of appeals acknowledged that the term "actual damages" has no "ordinary or plain" meaning because it is a "legal term of art"; expressed the view that the definition in *Black's Law Dictionary* "sheds little light" on the term's meaning in the Privacy Act; and stated that the use of the term in other statutory contexts reveals it to be a "chameleon," the meaning of which "changes with the specific statute in which it is found." Pet. App. 22a-24a (citation omitted). The court additionally recognized that its sister circuits were in conflict over whether "actual damages" under the Privacy Act includes nonpecuniary harms, with courts on

both sides of the divide agreeing that the term is "ambiguous." *Id.* at 21a-23a. But the court nevertheless concluded, based on what it described as "[i]ntrinsic" and "[e]xtrinsic" sources, that the term "actual damages" in the Privacy Act was "unambiguous" and that "a construction that limits recovery to pecuniary loss" was not "plausible." *Id.* at 22a, 28a, 34a (boldface omitted).

5. The government petitioned for rehearing or rehearing en banc. The court of appeals denied the petition, but the panel issued a slightly amended opinion (which deleted a footnote not relevant here). Pet. App. 1a-37a.

Judge O'Scannlain, joined by seven other judges, dissented from the order denying rehearing en banc. Pet. App. 8a-14a. The dissent criticized the panel for "neglect[ing]" the canon requiring strict construction of sovereign-immunity waivers (*id.* at 9a), and cautioned that "[w]e ignore at our peril [that] well-established clear statement rule" (*id.* at 13a). "The effect of today's order," the dissent stated, "is to open wide the United States Treasury to a whole new class of claims without warrant." *Id.* at 9a. The dissent observed that "[i]n so doing," the decision "exacerbate[d] a circuit split that had been healing under the strong medicine of recent sovereign-immunity jurisprudence." *Ibid.*

Judge Milan Smith, the author of the panel opinion, wrote a concurrence in the denial of rehearing en banc. See Pet. App. 2a-8a. He defended the panel's sovereign-immunity analysis, explaining that "[t]o construe the scope of this waiver, the panel followed controlling precedent directing the panel to look to the policies or objectives underlying the Act." *Id.* at 3a.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in concluding that the Privacy Act permits damages actions against the United States based purely on claims of mental or emotional distress. Because the Act's "actual damages" provision constitutes a limited waiver of the United States' sovereign immunity, the question is not whether the statutory text could be read to authorize such claims, but instead whether the statutory text clearly and unequivocally compels that conclusion. It does not. Interpreting "actual damages" to include only pecuniary harm is not only a possible construction of the Act, it is the best construction of the Act.

A. This Court has repeatedly held that the scope of a sovereign-immunity waiver must be narrowly construed in favor of the sovereign. That rule applies with special force when the extent of the United States' damages liability is at issue, in light of a court's obligation to assure itself that Congress has made a considered decision to expend Treasury funds for the purpose of paying the claims of particular plaintiffs. The use of the term "actual damages" in the Privacy Act provides no assurance that Congress made a considered decision to allow for an award of damages for claims of mental or emotional distress. Every court of appeals to have addressed the question has agreed that the term "actual damages" itself has no fixed meaning and could refer exclusively to damages other than damages for mental or emotional distress. Because a narrow construction of the Privacy Act's sovereign-immunity waiver—as including only pecuniary harm and excluding mental or emotional distress—is accordingly reasonable, a court is required to respect Congress's exclusive authority over the public fisc by adopting that construction.

B. Indeed, even setting sovereign-immunity principles to one side, that construction would be the most reasonable one. First, as this Court explained in *Doe* v. *Chao*, 540 U.S. 614, 624-625 (2004), the Privacy Act's damages remedy is likely modeled on certain common-law defamation torts that required proof of pecuniary harm as a precondition for recovery. As the Privacy Protection Study Commission—which was charged by the Act (among other things) with studying the Act's damages provision and which included two of the Act's original congressional sponsors—concluded, Congress incorporated that pecuniary-harm limitation in the Act. Second, Congress expressly tasked the Privacy Protection Study Commission with making a recommendation about whether to expand the Act to permit "general damages"—a term that Congress would have understood, and the Commission expressly did understand, as referring to awards for nonpecuniary harms such as mental and emotional distress. The only reasonable inference to draw, and the inference that the Commission itself drew, is that the existing provision for "actual damages" (which has never been amended to include "general damages") does not allow awards for mental or emotional distress.

The conclusion that the term "actual damages" is limited to pecuniary harm is reinforced by the unrebutted characterization of "actual damages" as "out-of-pocket expenses" on the floor of the House of Representatives, and by Congress's evident concern, during extensive legislative revision and debate, with limiting the government's liability under the Act. There is no suggestion that Congress intended to, or would have wanted to, expose the United States Treasury to significant new

liability based on subjective and uncapped claims of mental or emotional distress.

C. The Ninth Circuit offered no persuasive basis for subjecting the United States to such liability. Rather than focusing on the "actual damages" provision itself, the court of appeals looked elsewhere—including to its case law interpreting a different statute altogether—and erroneously attributed to Congress a single-minded purpose to provide plaintiffs with expansive damages remedies. Its analysis gives short shrift to the established rule that conditions on a waiver of the United States' sovereign immunity to suit for money damages must be strictly construed; overlooks key aspects of the "actual damages" provision; disregards this Court's decision in *Doe*; and conflicts with the conclusions of the Privacy Protection Study Commission. The Ninth Circuit's judgment should be reversed.

ARGUMENT

THE PRIVACY ACT DOES NOT SUBJECT THE UNITED STATES TO DAMAGES LIABILITY BASED ON CLAIMS OF MENTAL OR EMOTIONAL DISTRESS

The Privacy Act provides that in suits for certain types of "intentional or willful" violations of the Act, "the United States shall be liable" to the plaintiff for "actual damages sustained by the individual as a result of the [violation], but in no case shall a person entitled to recovery receive less than the sum of $1,000." 5 U.S.C. 552a(g)(4). This Court held in *Doe* v. *Chao*, *supra*, that the term "actual damages" in that provision serves two functions. First, it is a prerequisite for receiving any recovery at all: the provision "guarantees $1,000 only to plaintiffs who have suffered some actual damages." *Doe*, 540 U.S. at 627. Second, it is a measure for the amount

of recovery: a plaintiff will receive either "actual damages" or $1000, whichever is greater. 5 U.S.C. 552a(g)(4).

Congress's limited waiver of the United States' sovereign immunity for claims of "actual damages" does not encompass a damages action by a plaintiff who alleges only mental or emotional distress. As the court of appeals correctly recognized, "a waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text," and any ambiguity in the scope of such a waiver must be construed narrowly in the government's favor. Pet. App. 32a (quoting *Lane* v. *Peña*, 518 U.S. 187, 192 (1996)). Had the court of appeals adhered to that principle in this case, it would have concluded that sovereign immunity bars respondent's complaint, which contains no allegations of pecuniary loss. The term "actual damages," which is often understood not to encompass mental or emotional distress, cannot supply a clear and unequivocal waiver of the United States' sovereign immunity against claims seeking damages for such distress. Indeed, the text, structure, and legislative history of the Privacy Act, as well as the report of the Privacy Protection Study Commission established by the Privacy Act, demonstrate that the term "actual damages" is best read as authorizing only claims for pecuniary harm.

A. Congress Did Not Clearly And Unequivocally Waive The United States' Sovereign Immunity For Claims Of Mental Or Emotional Distress

The civil-remedies provision of the Privacy Act waives the United States' sovereign immunity from suit and from some form of damages remedy in certain cases. This Court has "frequently held" that such "a waiver of

sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). In order for the United States to be liable for money damages, or a particular type of money damages, Congress's intent must be "unequivocally expressed in statutory text." *Lane*, 518 U.S. at 192.

That well-established rule of sovereign immunity precludes an interpretation of the term "actual damages" that would expose the United States to uncapped damages liability under the Privacy Act based on a plaintiff's claims of mental or emotional distress. The term "actual damages" is often used to refer solely to pecuniary harm and not to mental and emotional distress. Since a court must "construe ambiguities in favor of immunity," *United States* v. *Williams*, 514 U.S. 527, 531 (1995), it is required to adopt that narrower definition.

1. The sovereign immunity of the United States encompasses not only immunity from suit altogether, but also strict observance of the conditions upon which a suit may proceed. See, *e.g.*, *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981); *United States* v. *Testan*, 424 U.S. 392, 399 (1976) ("It long has been established, of course, that the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'") (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). Accordingly, even when Congress has waived the sovereign immunity of the United States from suit, the availability of monetary relief, interest, and a jury trial depend upon an additional express and particularized waiver by Congress. See, *e.g.*, *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 34-37 (1992) (monetary claims unavailable); *Library of*

Congress v. *Shaw*, 478 U.S. 310, 318-319 (1986) (Title VII's general waiver of immunity does not authorize prejudgment interest); *Lehman*, 453 U.S. at 160 (jury trial unavailable); see also *United States* v. *John Hancock Mut. Life Ins. Co.*, 364 U.S. 301, 308 (1960) (despite the general waiver of immunity from suit in 28 U.S.C. 2410, "the United States is not subject to local statutes of limitations"). Any "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman*, 453 U.S. at 161 (citation omitted).

This Court has been "particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable" for "monetary exactions," *United States* v. *Idaho*, 508 U.S. 1, 8-9 (1993), because monetary claims against the United States present heightened separation-of-powers concerns. The power to waive sovereign immunity rests exclusively in Congress's hands. Neither the Executive Branch nor the Judicial Branch can effect a waiver through the exercise of its respective powers. See *OPM* v. *Richmond*, 496 U.S. 414, 424-434 (1990); *United States* v. *Shaw*, 309 U.S. 495, 501-502 (1940). Rather, the Executive Branch's Article II powers and the Judicial Branch's Article III powers are "limited by a valid reservation of congressional control over funds in the Treasury." *OPM*, 496 U.S. at 425; see U.S. Const. Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). Strict construction of statutory waivers of immunity thus ensures that courts do not mistakenly impose burdens on the public fisc that Congress did not authorize and that "public funds will be spent [only] according to the letter of the difficult judgments reached by Congress as to the

common good and not according to the individual favor of Government agents or the individual pleas of litigants." *OPM*, 496 U.S. at 428, 432; see also *INS* v. *St. Cyr*, 533 U.S. 289, 299 n.10 (2001) ("In traditionally sensitive areas, . . . the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.") (citations omitted). Scrupulous adherence to the statutory text is especially important in cases, like this one, in which the statutory language at issue is the product of hard-fought legislative compromise. See pp. 29-32, *infra*; cf. 120 Cong. Rec. 36,910 (1974) (Sen. Bayh) ("I understand there are restrictions between what we might like to accomplish and what we feel we have 51 votes for.").

2. In accordance with these principles, the requirement of narrow construction has long been applied to statutory terms, like "actual damages," that circumscribe the remedies available against the United States pursuant to a waiver of sovereign immunity enacted by Congress. "[W]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,'" or those that a court can plausibly infer from the statutory text, "but only those for which sovereign immunity has been expressly waived" by Congress itself. *Lane*, 518 U.S. at 197 (citation omitted).

In *Price* v. *United States*, 174 U.S. 373 (1899), for example, the question before the Court was whether a particular waiver of the government's immunity from suit for damages for property taken by Indians also encompassed a waiver of immunity for consequential damages—that is, "damages to other property which resulted as a consequence of the taking." *Id.* at 375.

The Court held that it did not. *Id.* at 377. The Court concluded that the determination of what type of damages Congress had authorized directly implicated the United States' sovereign immunity and, as such, "its liability in suit cannot be extended beyond the plain language of the statute authorizing it." *Id.* at 376. The Court stressed that the "contingencies in which the liability of the government is submitted to the courts," *ibid.*, are "a matter resting in [Congress's] discretion," *id.* at 377, and "cannot be enlarged by implication," regardless of what "may seem to this court equitable, or what obligation we may deem ought to be assumed by the government," *id.* at 375.

The Court took a similar approach in *United States Department of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992). There, Congress in the Clean Water Act, had waived the federal government's immunity from suit and authorized monetary "sanction[s]" against the government as "civil penalties" for certain violations. *Id.* at 615, 620-627 (citations omitted). The question presented was whether the United States' liability extended only to coercive fines (*i.e.*, fines to incentivize future compliance with the statute) or instead encompassed punitive fines (*i.e.*, fines to punish past violations) as well. *Id.* at 611. The Court held that the explicit waiver of sovereign immunity from monetary "sanction[s]," and Congress's use of "a seemingly expansive phrase like 'civil penalties arising under federal law,'" were not enough to overcome application of the "rule of narrow construction." *Id.* at 626-627. To the contrary, application of that traditional rule led the Court to "take[] the waiver no further than" authorizing coercive fines. *Id.* at 627. The Court acknowledged "unresolved tension" in the statutory scheme, which suggested that punitive sanctions might

indeed have been intended by Congress. *Id.* at 626. But the Court held that "under our rules that tension is resolved by the requirement that any statement of waiver be unequivocal" and narrowly construed to favor the sovereign. *Id.* at 627; see *id.* at 615; see also *Missouri Pac. R.R.* v. *Ault*, 256 U.S. 554, 563-564 (1921) (applying sovereign-immunity principles in interpreting waiver as limited to compensatory damages, and not to include additional "double damages" for delayed payment).

Likewise, in *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680 (1983), the Court strictly construed Congress's express waiver of sovereign immunity from an award of attorney's fees, "whenever [a court] determines that such an award is appropriate," in suits brought under the Clean Air Act. *Id.* at 681-682 (citation omitted). The Court held that, notwithstanding Congress's waiver of immunity from suit and its clear authorization of some monetary relief, the term "appropriate" should be narrowly construed to prevent judicial enlargement of the available relief beyond what Congress had clearly authorized. *Id.* at 685-686.

3. The same principle applies to the meaning of "actual damages" in the Privacy Act. The proper starting point for analyzing the scope of a waiver of sovereign immunity is the "common rule," with which the Court "presume[s] congressional familiarity, that any waiver of the National Government's sovereign immunity must be unequivocal." *United States Dep't of Energy*, 503 U.S. at 615. That is an especially important foundational principle here, because Congress was well aware, when it drafted the Privacy Act's civil-remedies provision, that it was defining the contours of a sovereign-immunity waiver. As one Member of Congress reminded his colleagues: "As I believe most of the lawyers in the

House know, it is a general principle of law that the Government, in exercising its governmental functions, is not liable." 120 Cong. Rec. at 36,660 (Rep. Erlenborn); see also, *e.g.*, *id.* at 35,659 (Rep. Butler) (questioning whether particular damages would be proper against the United States); *ibid.* (Rep. McCloskey) (similar).

A similar point was emphasized by the Privacy Protection Study Commission, an expert body established by Congress in the Privacy Act to study, *inter alia*, the Act's damages provision. § 5(a)(1), 88 Stat. 1905 (requiring that Commission members be "well qualified" based on "their knowledge and expertise" in one or more relevant areas, including "civil rights and liberties" and "law"); § 5(c)(2)(B)(iii), 88 Stat. 1907 (requiring Commission to consider and report on issues of damages liability under the Act). The members of the Commission included two of the Representatives who had been sponsors of the original legislation in the House of Representatives, along with other appointed experts. *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* ix (1977) (*Privacy Commission Report*) (listing Commission members, including Representatives Koch and Goldwater); see H.R. 16373, 93d Cong. (1974) (listing Representatives Koch and Goldwater as sponsors of the House Privacy Act bill). The Commission's 1977 report to the President and Congress observed, among other things, that "[t]he restriction on recovery articulated in the 'actual damage' standard of the Privacy Act reflects the ancient limitation on governmental liability embodied in the principle of sovereign immunity." *Privacy Commission Report* 531.

Both before and after the enactment of the Privacy Act, Congress has employed the term "actual damages"

(or the equivalent term "actual damage") to refer exclusively to economic harm. See 17 U.S.C. 1009(d)(1)(ii) (defining "actual damages" in copyright-related suit as "the royalty payments that should have been paid"); 18 U.S.C. 2318(e)(3)(B) (defining "actual damages" for counterfeit labeling by reference to the value of the goods); *Connecticut Ry. & Lighting Co.* v. *Palmer*, 305 U.S. 493, 494, 504 (1939) (interpreting "actual damage" in bankruptcy statute to mean economic damages normally permitted for breach of a lease); *Birdsall* v. *Coolidge*, 93 U.S. 64, 64-71 (1876) (discussing "actual damages" for patent infringement in economic terms). Accordingly, had Congress intended for the Privacy Act to contain a waiver of the United States' sovereign immunity to claims of mental and emotional distress, it would have, and was required to, use a term other than "actual damages." The appearance of the term "actual damages" in a civil-remedies statute is not necessarily a signal, and certainly is not a clear and unequivocal statement, of congressional intent to permit recovery for mental or emotional distress.

The Privacy Protection Study Commission reported, a mere three years after the Act's passage, that "there is no generally accepted definition of 'actual damages' in American law" and that the term can be used to refer exclusively to economic injuries. *Privacy Commission Report* 530. All four courts of appeals to consider the question presented—including the Ninth Circuit in this case—have similarly observed that the term "actual damages" has no fixed legal (or non-legal) meaning that would necessarily encompass mental or emotional distress. Pet. App. 24a; *Hudson* v. *Reno*, 130 F.3d 1193, 1207 n.11 (6th Cir. 1997), cert. denied, 525 U.S. 822 (1998), abrogated in part on other grounds by *Pollard* v.

E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001); *Johnson* v. *IRS*, 700 F.2d 971, 974 (5th Cir. 1983), abrogated in part on other grounds by *Doe*, 540 U.S. 614; *Fitzpatrick* v. *IRS*, 665 F.2d 327, 329 (11th Cir. 1982), abrogated in part on other grounds by *Doe*, 540 U.S. 614.

That observation should have ended this case. This Court has instructed that so long as there is a "plausible" narrower construction of ambiguous text in a waiver of sovereign immunity, that is "enough to establish that a reading imposing monetary liability"—here, the additional monetary liability of damages for mental and emotional distress—"is not 'unambiguous' and therefore should not be adopted." *Nordic Vill., Inc.*, 503 U.S. at 37; see *Sossamon* v. *Texas*, 131 S. Ct. 1651, 1658-1660 & n.4 (2011) (citing *Nordic Village* and applying similar principle in case concerning state sovereign immunity). The universal acknowledgment that "actual damages" *can* exclude mental and emotional distress thus by itself compels the conclusion that, in the context of the Privacy Act's waiver of sovereign immunity, the term *does* exclude mental and emotional distress.

B. In The Context Of The Privacy Act, The Term "Actual Damages" Refers Exclusively To Pecuniary Harm

Interpreting the term "actual damages" to exclude mental and emotional distress is, in any event, the far better interpretation of the Privacy Act even separate and apart from principles of sovereign immunity. First, as this Court has noted, Congress likely modeled the "actual damages" provision on a common-law remedy that required proof of pecuniary harm, rather than merely proof of mental or emotional distress, as a prerequisite to a damages award. Second, the Privacy Act expressly excluded a certain type of damages that Con-

gress would have understood as including recovery for mental and emotional distress—"general damages"—from the scope of the "actual damages" provision and instead assigned the Privacy Protection Study Commission to study whether the Act should later be expanded to include such damages. The Commission accordingly recognized that the Act, as enacted, allowed recovery only for pecuniary harm.

An interpretation of the term "actual damages" as including only pecuniary harm is, moreover, reinforced by the legislative history, which demonstrates Congress's acute concern with restricting the United States' financial exposure under the Act. The only statement in the legislative history that directly addresses the issue supports the limitation of "actual damages" to "out-of-pocket" expenses. Congress's decision to adopt such a limitation represents a sound policy choice to reduce the government's exposure and litigation costs by making money damages available only to plaintiffs who could demonstrate a concrete and easily monetizable injury.

1. As previously noted (see pp. 12-13, *supra*), this Court held in *Doe* v. *Chao* that proof of "actual damages" is a prerequisite to *any* monetary recovery under the Privacy Act. 540 U.S. at 627. A plaintiff who can show "actual damages" is entitled to either those damages or $1000, but a plaintiff who cannot show any "actual damages" has no entitlement to recovery at all. *Ibid.*

Doe did not expressly decide whether the term "actual damages" is limited to out-of-pocket expenses. 540 U.S. at 627 n.12. Its reasoning, however, strongly supports that conclusion. In particular, the Court recognized in *Doe* that the Privacy Act's "actual damages" provision was likely modeled on a particular common-

law doctrine in which a plaintiff would have to prove pecuniary harm, and not simply mental or emotional distress, to recover damages. 540 U.S. at 625.

The petitioner in *Doe* had argued that it would be "peculiar" to interpret the Privacy Act's civil-remedies provision to provide $1000, "as a form of presumed damages not requiring proof of amount, only to those plaintiffs who can demonstrate actual damages." 540 U.S. at 625. The Court rejected that argument, observing that "this approach parallels another remedial scheme that the drafters of the Privacy Act would probably have known about." *Ibid.* "At common law," the Court explained, "certain defamation torts" permitted plaintiffs to "recover presumed damages only if they could demonstrate some actual, quantifiable pecuniary loss." *Ibid.*

The defamation torts referred to by the Court in *Doe* are sometimes called defamation "per quod" (to distinguish them from defamation "per se," in which damages are automatically presumed). See, *e.g.*, Dan B. Dobbs, *Handbook on the Law of Remedies* § 7.2, at 512-513 (1st ed. 1973) (Dobbs). Those torts required a plaintiff to prove "special harm" (sometimes called "special damages") as a prerequisite to *any* monetary award. *Doe*, 540 U.S. at 625 (citing Restatement of Torts § 575 cmts. a and b (1938) (First Restatement); Restatement (Second) of Torts § 575 cmts. a and b (1977) (Second Restatement)); see Dobbs § 7.2, at 520. "Special harm" was defined as "harm of a material and generally of a *pecuniary* nature." *Doe*, 540 U.S. at 625 (emphasis added) (quoting First Restatement § 575 cmt. b); see Second Restatement § 575 cmt. b ("Special harm, as the words are used in this Chapter, is the loss of something having economic or pecuniary value."); Dobbs § 7.2, at 520

("Special damages in defamation cases mean pecuniary damages, or at least 'material loss.'") (footnote omitted).

Emotional or mental distress was not considered to be "special harm" or "special damages" that would trigger damages liability for defamation per quod. As the First Restatement of Torts explained, "[t]he emotional distress caused to the person slandered by his knowledge that he has been defamed is not special harm and this is so although the distress results in a serious illness." First Restatement § 575 cmt. c; see Second Restatement § 575 cmt. c ("Under the traditional rule, the emotional distress caused to the plaintiff by his knowledge that he has been defamed is not special harm; and this is true although the distress results in a serious illness."); Dobbs § 7.2, at 520 ("Even under the more modern approach, special damages in defamation cases must be economic in nature, and it is not enough that the plaintiff has suffered harm to reputation, mental anguish, or other dignitary harm, unless he has also suffered the loss of something having economic value."). Accordingly, "neither emotional distress nor bodily harm resulting from it is special harm sufficient to support an action for a slander which is not actionable per se." First Restatement § 623 cmt. a; see Second Restatement § 623 cmt. a (same); see also Dobbs § 7.2, at 520.

If, as this Court posited in *Doe*, defamation per quod was the model for the Privacy Act's "actual damages" provision, the natural conclusion is that Congress incorporated that tort's threshold limitations into the Privacy Act. Accordingly, the "actual damages" that a plaintiff must show to obtain any recovery under the Privacy Act is best interpreted to include only pecuniary harm, and to exclude emotional or mental distress.

That interpretation is reinforced by the contemporary understanding of the Act. The only statement in the legislative history that directly addresses the issue supports the view that "actual damages" is limited to economic harm. Representative Eckhardt, commenting on a version of the bill that provided for "actual damages," stated that "[t]here is nothing in this that would provide for any damages beyond [a plaintiff's] actual *out-of-pocket* expenses." 120 Cong. Rec. at 36,956 (emphasis added). No Member of Congress disputed Representative Eckhardt's understanding.

The Court's analysis in *Doe*—and the conclusion that "actual damages" includes only pecuniary harm—finds additional support in the report of the Privacy Protection Study Commission. As part of its discussion of the Act's damages provision, the Commission's 1977 report stated that, "within the context of the Act," the term "actual damages" was "intended as a synonym for special damages as that term is used in defamation cases." *Privacy Commission Report* 530. The Commission went on to explain that "special damages in defamation cases are more limited than in other situations; the injuries clearly covered by them are loss of specific business, employment, or promotion opportunities, or other tangible *pecuniary* benefits." *Ibid.* (emphasis altered). "Injuries *not* provided for," the Commission continued, "are those which may be labeled intangible: namely, loss of reputation, chilling of constitutional rights, or *mental suffering* (where unaccompanied by other secondary consequences)." *Ibid.* (emphasis added).

2. Indeed, the Act's text and drafting history expressly demonstrate that Congress considered the possibility of awarding damages for mental or emotional distress, but "left the question * * * for another day."

Doe, 540 U.S. at 622. The Privacy Act required the Privacy Protection Study Commission, "among its other jobs, to consider 'whether the Federal Government should be liable for general damages'" under the Act. *Doe*, 540 U.S. at 622 (quoting § 5(c)(2)(B)(iii), 88 Stat. 1907). The Senate had originally passed a bill that would have allowed for recovery of both "actual damages" and "general damages." *Id.* at 622-623; see also *id.* at 637-638 (Ginsburg, J., dissenting). But the "general damages" language "was trimmed from the final statute, subject to any later revision that might be recommended by the Commission," *id.* at 623, and was never added back in.

By declining to enact a "general damages" remedy, Congress rejected a damages award for either assumed or proven mental or emotional harm. As the Court observed in *Doe*, the term "general damages" included "presumed damages," *i.e.*, "a monetary award calculated without reference to specific harm." 540 U.S. at 621; see *id.* at 621 n.3 (citing First Restatement § 621 cmt. a and § 867 cmt. d; Second Restatement § 621 cmt. a); see also *id.* at 623 (noting that a "provision for general damages would have covered presumed damages"). At common law, such presumed damages were essentially an automatic monetary recovery based on the harm that the defamation was "assumed to have caused to the [plaintiff's] reputation," even if the plaintiff could not concretely prove such harm in monetary terms. First Restatement § 621 cmt. a; see Second Restatement § 621 cmt. a; Dobbs § 7.2, at 514-515. In particular, they would have included damages "for such emotional distress" that the factfinder believed would "normally result[] from" the defamation. First Restatement § 623;

see Dobbs § 7.2, at 514; see also Second Restatement § 623 cmt. b.

Congress would likely also have understood the term "general damages" in this context to encompass proven, as well as presumed, emotional-distress damages. Although, as just discussed, a plaintiff was entitled simply to have the trier of fact presume the sorts of harm compensated by "general damages," a plaintiff would often try to prove them, presumably in the hope of increasing his award by convincing the factfinder that his injury was unusually serious. First Restatement § 621 cmt. a (general damages "compensat[e] the plaintiff for * * * harm * * * *which is proved*, or, *in the absence of proof*, assumed") (emphasis added); Second Restatement § 621 cmt. a (similar); see also First Restatement § 904 cmt. a (discussing proof of general damages); Second Restatement § 904 cmt. a (similar). The term "general damages" was thus used to broadly describe *all* damages, presumed or proven, for certain types of harm. See First Restatement § 904; Second Restatement § 904; Dobbs § 3.2, at 139. Specifically, for the sort of dignitary torts that Congress had in mind when it drafted the Privacy Act, "the term 'general damages' * * * refer[red] to damages awarded for the affront to the plaintiff's dignity and *the emotional harm done*." Dobbs § 3.2, at 139 (emphasis added). "These [were] called 'general damages,' to distinguish them from proof of actual economic harm and from punitive damages." *Ibid.*

Accordingly, when Congress elected to submit the issue of "general damages" to the Commission for further study (88 Stat. 1907), and to include only "actual damages" in the operative text of the Act (5 U.S.C. 552a(g)(4)), it was excluding claims of mental and emo-

tional distress from the scope of the Act's civil-remedies provision. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted). As the Court recognized in *Doe*, Congress substituted a $1000 statutory-minimum award in place of "general damages." 540 U.S. at 622-623, 625-626. In a common-law suit for defamation per quod, a plaintiff who cleared the threshold hurdle of proving pecuniary harm could then have recovered both his pecuniary damages and also "general damages," including damages for mental and emotional distress. *Id.* at 625; see First Restatement § 575 cmt. a; *id.* § 623 cmt. a; Second Restatement § 575 cmts. a, c; *id.* § 621 cmt. a; *id.* § 623 cmt. a; Dobbs § 7.2, at 520-521. The Privacy Act, however, does not open up a new category of "general damages" to plaintiffs who meet the threshold requirement of proving "actual damages." 5 U.S.C. 552a(g)(4)(D); see *Doe*, 540 U.S. at 620. Instead, a plaintiff who can prove "actual damages" simply recovers those "actual damages," or, if those damages are below $1000, receives a statutory-minimum award "as a form of presumed damages." *Id.* at 625.

The Commission itself recognized that the Privacy Act, as adopted by Congress in 1974, did not provide damages for mental or emotional distress and that it was required to make a recommendation as to whether the Act should be expanded to include such an award through an allowance of "general damages." The Commission's report explained that "[c]ompensation for *any* injury done to an individual is available under a claim of general damages." *Privacy Commission Report* 530;

see *ibid.* ("An individual can make claims for losses due to pain and suffering, for example, even though it is impossible to fix a precise dollar value to such an injury."). The Commission contrasted that broad category of "general damages" with the damages available under the Act. "The legislative history and language of the Act," the Commission explained, "suggest that Congress meant to restrict recovery to specific pecuniary losses until the Commission could weigh the propriety of extending the standard of recovery." *Ibid.*

The Commission did ultimately recommend, in its 1977 report, that the Privacy Act be amended to permit recovery of "general damages," albeit subject to a $10,000 cap. *Privacy Commission Report* 531. Specifically, the Commission recommended that the Act should be expanded to provide "recovery for intangible injuries such as pain and suffering, loss of reputation, or the chilling effect on constitutional rights" that might, in theory, be caused by certain Privacy Act violations. *Id.* at 531. Congress did not, however, adopt that recommendation. Congress thus has provided no basis for a court to read into the Act a right to money damages based on a claim of mental or emotional distress.

3. Judicial recognition of a right to recover damages for mental or emotional distress would be particularly inappropriate in light of Congress's concern, in enacting the Privacy Act, with limiting the Act's impact on the public fisc. "Throughout the Privacy Act debate, a central concern was the scope of potential government liability for damages." *Fitzpatrick*, 665 F.2d at 330; see, *e.g.*, 120 Cong. Rec. at 36,644 (Rep. Moorhead) ("We have tried to tailor this bill so that it will protect individual rights and at the same time permit the Government to operate responsibly and perform its functions without

unjustifiable impediments."); *id.* at 36,659 (Rep. McCloskey) ("[W]e are trying to balance two great interests here. We are trying to balance the necessity of balancing the budget, and we are trying to protect the government from undue liability.").

There were proposals, for example, to allow recovery of actual damages even when the violation was neither intentional nor willful, and to allow recovery of punitive damages in certain cases. See, *e.g.*, S. 3418, 93d Cong. § 304(b)(1) and (2) (1974); H.R. 16373, 93d Cong. § 3(f)(3)(A) and (B) (1974). Those proposals were defeated, and the statutory text as enacted conditions damages liability on an "intentional or willful" government act and limits such liability to "actual damages." 5 U.S.C. 552a(g)(4).

The rejection of proposals for broader and more open-ended liability rested largely on concerns about the damages exposure of the United States. For example, one Member of Congress stated in respect to one of the proposals that "I think it is wrong to make the Government of the United States and this congressional budget subject to an absolutely incalculable amount of liquidated damages." 120 Cong. Rec. at 36,659 (Rep. McCloskey). Responding to that same proposal, another Member pointed out that it would be "unprecedented to make [the] Government liable for punitive damages." *Id.* at 36,660 (Rep. Erlenborn). His colleagues had similar concerns. *Id.* at 36,659 (Rep. Butler) ("May I fairly observe there is no sovereignty in the world that exposes itself to punitive damages by a statute of this nature?"); *ibid.* (Rep. McCloskey) (noting that this "would be the first time in history that the United States has made itself subject to punitive damages in any cause or in any case"); see also *id.* at 36,956 (statements of Rep.

Butler) (questioning the precedent for awarding "actual damages" in cases of government negligence).

It would have been similarly "unprecedented" to make the United States liable for damages for mental or emotional distress. We are unaware of any pre-1974 decision imposing liability on the United States for mental or emotional harm pursuant to a statute that limits recovery to "actual damages." It would be highly unusual for Congress to subject the United States to liability for mental or emotional distress for the first time without expressly so providing, and, indeed, without any debate. Yet the one (unchallenged) statement in the legislative history on the subject characterized a provision allowing for "actual damages" as limited to a plaintiff's "out-of-pocket expenses." 120 Cong. Rec. at 36,956 (Rep. Eckhardt).

Had Congress actually intended open-ended liability for a plaintiff's asserted mental or emotional distress, there might, at the very least, have been some discussion of a cap on the amount of such damages. Out of concern for open-ended liability, for example, the Privacy Protection Study Commission recommended a cap when it suggested that the Act be amended to allow an award of "general damages." *Privacy Commission Report* 531 (unenacted recommendation to allow recovery of "general damages" only up to $10,000, with goal of "ensuring that recovery does not become too burdensome"). But there is in fact no express suggestion in the legislative history of the Privacy Act that Congress intended to allow an award of damages for mental or emotional distress. That absence of any expression of such an intent contrasts tellingly with Congress's close attention to fiscal concerns in other aspects of the legislation. See, *e.g.*, 120 Cong. Rec. at 36,956 (Rep. Erlenborn)

(stating that if the House of Representatives adopted an amendment permitting actual damages without proof of intention or willfulness, "I, for one, would recommend to the President—as important as this bill might be—that he veto it. We just cannot afford to have that kind of liability, leaving the Government so exposed.").

4. The legislative history thus points in the same direction as the text and structure of the Act and the Privacy Protection Study Commission's report: namely, that the Act limits the damages available solely to pecuniary harm. Any Members of Congress who might have believed that more was warranted could look forward to the prospect of revisiting the issue when the Commission completed its study. Privacy Act § 5(c)(2)(B)(iii), 88 Stat. 1907 (requiring the Commission to make a recommendation about whether "general damages" should be allowed under the Act). But even after the Commission recommended that the Act be extended to permit additional damages, including damages for mental and emotional distress, up to a $10,000 cap, Congress declined to enact such an expansion. There are significant reasons why Congress would decline to expose the United States to such liability.

First, permitting emotional-distress damages would have greatly expanded the United States' liability. The Privacy Act covers an enormous range of government conduct. It applies broadly to "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. 552(f); see 5 U.S.C. 552a(a)(1) & References In Text. And it broadly covers those entities' handling of any "record"—defined

expressly to include "any item, collection, or grouping of information about an individual that is maintained by an agency * * * that contains his name, or the identifying number, symbol or other identifying particular assigned to the individual"—maintained in a "system of records." 5 U.S.C. 552a(a)(4)-(5). Such governmental record-keeping activity is pervasive, and plaintiffs frequently allege that government agencies have violated the Privacy Act: case-tracking data collected by the Department of Justice reveal more than 400 separate Privacy Act suits (seeking either damages or other relief) since the start of 2005.

That number of course would be higher, and the lawsuits themselves far more costly, if the Act were construed to permit an award of damages based solely on claims of mental or emotional distress. Allowing emotional-distress damages would open the door to damages actions by plaintiffs, like respondent here, who otherwise would not have any damages claim at all under the Act. And even as to plaintiffs who might be able to show some pecuniary harm, permitting emotional-distress damages would greatly increase the size of judgments and strengthen plaintiffs' settlement leverage. Congress cannot lightly be taken to have invited that result. It is "undisputed" that Congress, in enacting Section 552a(g)(4), not only sought to "deter[] violations and provid[e] remedies when violations occur," but also "did not want to saddle the Government with disproportionate liability." *Doe*, 540 U.S. at 637 (Ginsburg, J., dissenting).

Second, emotional-distress damages are inherently problematic because they are to a large extent subjective and not easily quantifiable. Cf. *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 552 (1994) (rejecting

proposed test under Federal Employers' Liability Act pursuant to which "[j]udges would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts"). Congress, however, is very likely to have placed a premium on the predictability of government liability. For plaintiffs able to show at least some actual pecuniary loss connected to a Privacy Act violation, Congress could have some confidence that there would be an objective basis for awarding reimbursement (or the statutory minimum of $1000). Congress could have no similar degree of confidence for claims of mental or emotional distress. Such claims are, in addition, complicated and expensive to litigate. Whereas pecuniary damages can generally be proven through receipts, pay records, and the like, litigation over asserted mental or emotional distress could be much more extensive and typically would require expert discovery of opposing psychologists and cause the government to seek independent medical examinations of plaintiffs.

Third, Congress reasonably could conclude that, on balance, the Privacy Act already provides sufficient protection for individuals who suffer no pecuniary harm. The Act includes criminal penalties for certain violations, including knowing and willful violations of the disclosure-related provision at issue here. See 5 U.S.C. 552a(i). And damages actions are not the only potential civil remedy available for violations of the Act's disclosure-related or other provisions. A plaintiff will be able seek injunctive relief under the Administrative Procedure Act to halt any ongoing agency violation of the Privacy Act, so long as he can demonstrate that he is

adversely affected by the agency's practice. 5 U.S.C. 702, 706; *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983).*

The Privacy Act is in fact unusual in permitting monetary relief against the federal government at all. The Administrative Procedure Act, which provides the typical basis for challenging federal agency action, specifically excludes "money damages" from the available forms of relief. 5 U.S.C. 702. In suits against the United States, the availability of retrospective money damages is therefore the exception rather than the rule. There is, accordingly, no reason to presume that Congress meant for "actual damages" in the Privacy Act to include the even more exceptional relief of damages for mental and emotional distress, especially when fundamental principles of sovereign immunity and all of the traditional tools of statutory interpretation point in the opposite direction.

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* Such a suit is permissible, notwithstanding the Privacy Act's independent remedial scheme, because the Privacy Act itself is part of the Administrative Procedure Act. The Privacy Act's provisions principally derive from the House bill (H.R. 16373). Compare H.R. 16373 and 120 Cong. Rec. at 40,398-40,400, with *id.* at 40,400-40,405 (compromise text). The House Bill was designed to protect personal privacy "within the framework of the Freedom of Information Act (5 U.S.C. 552)," H.R. Rep. No. 1416, 93d Cong., 2d Sess. 2 (1974), which itself was enacted as an amendment to Section 3 of the Administrative Procedure Act (Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238). See *Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 (1989). To do so, H.R. 16373 proposed amending Title 5 of the United States Code by inserting a Section 552a within the codified provisions of the Administrative Procedure Act immediately following the Freedom of Information Act. See H.R. Rep. No. 1416, *supra*, at 1, 27; Privacy Act §§ 3-4, 88 Stat. 1897-1905.

C. The Ninth Circuit Erred In Construing The Privacy Act To Waive Sovereign Immunity For Claims Of Nonpecuniary Harm

The court of appeals correctly acknowledged that "if actual damages is susceptible of two plausible interpretations," then the term must be construed "narrowly in favor of the Government," meaning "that nonpecuniary damages are not covered." Pet. App. 34a. The court nevertheless proceeded to conclude that the Privacy Act's reference to "actual damages" admits of only one meaning: a broad definition that encompasses nonpecuniary damages, such as damages for emotional distress and mental anxiety. *Ibid.* That conclusion is untenable. None of the sources relied upon by the court of appeals supports the view that the broad reading is the better one, let alone the only one.

1. To begin with, the court of appeals focused on 5 U.S.C. 552a(g)(1)(D), which provides that an individual "may bring a civil action" whenever an agency "fails to comply with" certain Privacy Act provisions or rules, including the disclosure-related provision at issue here, "in such a way as to have an adverse effect on an individual." Pet. App. 27a. The court observed that it and other courts "have recognized that a nonpecuniary harm, such as emotional distress, may constitute an adverse effect" under that provision. *Ibid.* The court believed that interpreting "actual damages" not to include such distress would be "an unreasonable construction of the Act," because it would suggest that an individual who has experienced an "adverse effect" might nevertheless not be eligible to recover damages. *Ibid.*

As Judge O'Scannlain and the other seven judges who dissented from the denial of en banc rehearing observed, the court of appeals' reasoning "quite clearly"

conflicts with this Court's decision in *Doe*. Pet. App. 12a-13a. *Doe* made clear that the "adverse effect" and "actual damages" requirements are distinct. 540 U.S. at 624-625. The "adverse effect" requirement, the Court explained, has the "limited but specific function" of "identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing," whereas the "actual damages" requirement addresses the prerequisite to a *monetary* recovery. *Ibid.* An "adverse effect" is insufficient by itself to establish "a complete cause of action" for money damages under Section 552a(g)(1)(D); the Act also "require[s] some actual damages as well." *Id.* at 624; see *id.* at 624-625 ("[A]n individual subjected to an adverse effect has injury enough to open the courthouse door, but without more has no cause of action for damages under the Privacy Act."). The court of appeals therefore erred in equating the two requirements, as Congress expressly provided that only a subset of plaintiffs with standing to sue could recover money damages. See Pet. App. 12a (O'Scannlain, J., dissenting from denial of rehearing en banc) ("[T]he court's recourse to the Privacy Act's standing provision * * * is the most troubling [aspect of the decision], because it conflicts with the Supreme Court's interpretation of the very provision of the Privacy Act at issue in this case.").

2. The Ninth Circuit also erred in relying on the Privacy Act's generally worded preamble. The preamble states, in relevant part, that the "purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring federal agencies, except as otherwise provided by law, to," *inter alia*, "be subject to civil suit for any damages which occur as a result of willful or intentional action which vio-

lates any individual's rights under this Act." § 2(b)(6), 88 Stat. 1896; see Pet. App. 24a-25a. According to the court of appeals, the Act's "actual damages" provision should be interpreted to include mental and emotional distress so as to "fully realize[]" the preamble's use of the phrase "any damages." *Id.* at 26a.

But that generic language (which is itself ambiguous) neither supersedes nor even accurately describes the operative text of the remedial provisions of the Act. The preambular statement of purpose is expressly qualified by the phrase "except as otherwise provided by law," making clear that the Act's operative provisions, rather than its preamble, are controlling. § 2(b)(6), 88 Stat. 1896. Under those operative provisions, many violations of the Act, even if willful or intentional, do not give rise to a cause of action for damages under any circumstances. See 5 U.S.C. 552a(g)(2)-(3) (providing only injunctive relief, not money damages, for failure to correct a record or to provide an individual with access to his records). When damages are available, the damages provided are neither "any damages," nor even "general damages," but instead only "actual damages." See *Russello*, 464 U.S. at 23 (different terms in the same act are presumed to have different meanings).

The court of appeals thus erred in permitting general notions of congressional purpose to trump specific legislative consideration of the precise matter at hand and the specific statutory provisions addressing that matter. "No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary ob-

jective must be the law." *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990) (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam)). As previously discussed, Congress was concerned about the potential financial impact of the Act and limited the civil-remedies provisions accordingly. See *Doe*, 540 U.S. at 637 (Ginsburg, J., dissenting) (acknowledging that although Congress wanted to "deter[] violations and provid[e] remedies when violations occur," it "did not want to saddle the Government with disproportionate liability"). Courts should respect the product of that legislative compromise and not enlarge the Privacy Act's waiver of sovereign immunity beyond its express terms.

3. The court of appeals similarly sought to find support for its interpretation of "actual damages" in other provisions that discuss the Act's purposes. See Pet. App. 26a. The court observed that the Act "obligates agencies to maintain a records system that 'shall . . . establish appropriate administrative, technical and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, *embarrassment*, inconvenience, or unfairness to any individual on whom information is maintained.'" *Ibid.* (quoting 5 U.S.C. 552a(e)(10)) (emphasis supplied by court). The court further observed that the Act "provides a civil remedy for an agency's failure 'to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the . . . *character* . . . of . . . the individual that may be made on the basis of such record.'" *Ibid.* (quoting 5 U.S.C.

552a(g)(1)(C)) (emphasis supplied by court). The court believed that "Congress's use of language to ensure that a federal agency's record-keeping practices do not result in embarrassment or harm to one's character bolsters a construction of actual damages that reaches nonpecuniary damages." *Ibid.*

The two words ("embarrassment" and "character") highlighted by the court of appeals do not illuminate the meaning of "actual damages." Neither of the subsections in which those words appear purports to interpret "actual damages," a term that applies not only to cases involving those subsections, but to a much broader set of cases (including the present case). Congress's recognition that certain Privacy Act violations may cause embarrassment does not demonstrate—let alone unequivocally demonstrate—that Congress intended to award damages every time a plaintiff has been embarrassed. Had Congress intended that result, it would have drafted the Act's damages provision differently: it would not have limited recovery to "intentional or willful" violations, 5 U.S.C. 552a(g)(4); it would have used a different term in place of "actual damages," 5 U.S.C. 552a(g)(4)(A); and it would have permitted a monetary award to anyone who had suffered an "adverse effect," as opposed to only plaintiffs who have sustained "actual damages," see *Doe*, 540 U.S. at 624-625.

A plaintiff who is "embarrass[ed]" due to a failure of agency safeguards, 5 U.S.C. 552a(e)(10), or whose records are maintained in such a way that an unfair determination of "character" is threatened, 5 U.S.C. 552a(g)(1)(C), may have an action for injunctive relief. See pp. 34-35 & n.*, *supra*. But without any proof of "actual damages"—*i.e.*, pecuniary harm—he does not

have a claim for monetary recovery. *Doe*, 540 U.S. at 620.

4. The court of appeals additionally tried to buttress its interpretation of the Privacy Act by reference to circuit precedent interpreting a different statute altogether, the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.* FCRA, originally enacted in 1970, is a consumer-protection statute that regulates the collection, dissemination, and use of information related to a consumer's finances and creditworthiness. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 23 (2001). It contains civil-remedies provisions that allow a consumer to recover "actual damages" for willful or negligent violations of its substantive requirements. 15 U.S.C. 1681n (2006 & Supp. III 2009); 15 U.S.C.1681*o*. The court of appeals perceived similarities "in purpose and time" between FCRA and the Privacy Act that, in its view, made FCRA "a reliable extrinsic source" for interpreting the meaning of "actual damages" in the Privacy Act. Pet. App. 31a. The court accordingly believed that circuit precedent interpreting "actual damages" recoverable under FCRA to include emotional-distress damages "buttresse[d]" a similar construction of the term "actual damages" in the Privacy Act. *Id.* at 30a-31a.

The court of appeals' resort to FCRA to interpret the Privacy Act is mistaken in several respects. As a threshold matter, any attempt to directly equate the meaning of "actual damages" in two different statutes presents inherent difficulties. As the court of appeals itself recognized in another portion of its opinion, the term "actual damages" is a "chameleon," the meaning of which "changes with the specific statute in which it is found." Pet. App. 23a-24a (citation omitted). Even if comparisons of this sort had force in some circum-

stances, the particular comparison between the Privacy Act and FCRA is inapt, because it overlooks material differences in the statutes' language and structure. Cf. *Doe*, 540 U.S. at 626-627 (rejecting asserted comparisons between Privacy Act's civil-remedies provision and remedial provisions in other statutes). FCRA does not condition "entitle[ment] to recovery" on proof of "actual damages," as the Privacy Act does, and FCRA's interpretation would therefore not be informed by the common-law remedies available for defamation per quod, as the Privacy Act's interpretation is. Compare 5 U.S.C. 552a(g)(4)(A), with 15 U.S.C. 1681n and 15 U.S.C. 1681o; see pp. 22-25, *supra*. Nor does FCRA's text provide a clear contrast between "general damages" and "actual damages," as the Privacy Act's text does. Compare Privacy Act § 5(c)(2)(B)(iii), 88 Stat. 1907, with 5 U.S.C. 552a(g)(4)(A); see *Russello*, 464 U.S. at 23.

Furthermore, it is not definitively settled today, and certainly was not settled when the Privacy Act was enacted, that "actual damages" under FCRA includes recovery for mental or emotional distress. This Court has never itself interpreted FCRA to permit damages for mental or emotional distress. Only one judicial decision to do so—from the District Court for the Eastern District of Missouri—predated the Privacy Act's enactment. See *Millstone* v. *O'Hanlon Reports, Inc.*, 383 F. Supp. 269 (1974) (decided on October 12, 1974), aff'd, 528 F.2d 811 (8th Cir. 1976). Even that decision came well after the original Privacy Act bills, containing the term "actual damages," were introduced into Congress. See S. 3418, 93d Cong. (1974) (introduced May 1, 1974); H.R. 16373 (introduced August 12, 1974). Finally, we are aware of no court that has ever held that emotional-distress damages are available against the *United States*

under FCRA. FCRA is a statute of general applicability, and it is the government's position that the United States is immune from suit under its general civil-remedies provisions. See *United States* v. *Bormes*, petition for cert. pending, No. 11-192 (filed Aug. 12, 2011) (presenting question whether the Little Tucker Act, 28 U.S.C. 1346(a)(2), waives the United States' sovereign immunity to suit under FCRA's general civil-remedies provisions). Cases construing FCRA in the context of private civil actions have had no occasion to address whether FCRA's reference to "actual damages" clearly and unambiguously waives United States' sovereign immunity to damages for mental or emotional distress.

5. Finally, the court of appeals sought support for its holding in two decisions of this Court: *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Pet. App. 25a. Those decisions, which impose First Amendment limitations on state-law damages actions for the publication of falsehoods, have no bearing on the issue of how far the statutory damages remedy in the Privacy Act extends.

In *Time, Inc.*, the Court addressed a suit under New York law against the publisher of an allegedly inaccurate magazine article. 385 U.S. at 376-377. The Court held, "upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals," that the plaintiff had to prove "knowing or reckless falsehood" in order to recover. *Id.* at 390.

In *Gertz*, the Court held (among other things) that plaintiffs in state-law defamation suits could not recover presumed damages, but were instead limited only to "compensation for actual injury," unless they could prove that the defendant knowingly lied or recklessly

disregarded the truth. 418 U.S. at 349. The Court declined to define the term "'actual injury,'" but explained that it "is not limited to out-of-pocket loss," observing that "the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350.

The court of appeals found *Time, Inc.* and *Gertz* instructive on the issue of "what types of injuries typically result from the violation of" a right to privacy. Pet. App. 25a. "Given the nature of the injuries that most frequently flow from privacy violations," the court reasoned, "it is difficult to see how Congress's stated goal of subjecting federal agencies to civil suit for *any damages* resulting from a willful or intentional violation of the Act could be fully realized unless the Act encompasses both pecuniary and nonpecuniary injuries." *Id.* at 26a.

As already discussed, however, the operative language of the Act does not entitle plaintiffs to "any damages," but only to "actual damages." Respondent has suggested (Br. in Opp. 20-21) that *Time, Inc.* and *Gertz* would nevertheless have informed Congress's view of what the term "actual damages" meant in the context of the Privacy Act. But those decisions arose in a different context, and neither decision employed the term "actual damages." Use of the term "actual injury" in the context of a judicial opinion addressing a private state-law suit for the publication of an inaccurate article provides no meaningful insight into Congress's use of the term "actual damages" in a statutory waiver of federal sovereign immunity for claims arising out of federal record-keeping.

At most, *Time, Inc.* and *Gertz* support the unexceptional proposition that, as a matter of state law, emotional-distress damages were often available to plaintiffs alleging certain types of privacy and defamation torts. Congress was well aware of that, but it rejected a similar scheme for the Privacy Act when it opted not to permit the recovery of "general damages." See pp. 25-29, *supra*.

If *Time, Inc.* or *Gertz* (or, for that matter, any other source) in fact provided a controlling definition of the term "actual damages" in the Privacy Act that would include nonpecuniary harm, such a definition was unlikely to have escaped the notice of the Privacy Protection Study Commission. The Commission instead concluded that "actual damages," as used in the Privacy Act, "was intended as a synonym for special damages as that term is used in defamation cases," which are limited to "injury that has caused clear economic loss to the individual." *Privacy Commission Report* 530. That interpretation is supported by principles of sovereign immunity, the text and structure of the Act, this Court's decision in *Doe*, the legislative history, and sound policy considerations. The Ninth Circuit therefore fundamentally erred by nevertheless exposing the United States to additional damages liability for mental or emotional distress.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
MARK B. STERN
SAMANTHA L. CHAIFETZ
Attorneys

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RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

FEDERAL AVIATION ADMINISTRATION, ET AL.,
Petitioners,

v.

STANMORE CAWTHON COOPER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE RESPONDENT

RAYMOND A. CARDOZO
Counsel of Record
JAMES M. WOOD
JAMES C. MARTIN
DAVID J. BIRD
TIFFANY RENEE THOMAS
THOMAS M. POHL
Reed Smith LLP
101 Second St., Ste. 1800
San Francisco, CA 94105
(415) 543-8700
rcardozo@reedsmith.com
Attorneys for Respondent

Library of Congress
Law Library

QUESTION PRESENTED

Whether a plaintiff can establish "actual damages" under the Privacy Act's civil liability provisions, 5 U.S.C. §§ 552a(g)(1)(C)-(D) and (g)(4), by relying on evidence that a federal agency's intentional or willful violation of the Act caused severe mental and emotional distress.

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STATEMENT

A. The Privacy Act Authorizes Civil Suits Against Federal Agencies For "Actual Damages" Caused By Intentional Or Willful Disclosures Of Confidential Information

As stated by Congress, the purpose of the Privacy Act of 1974 is to "provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies . . . to" comply with specified record-keeping duties and to "be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." Privacy Act of 1974, Pub. L. No. 93-579, § 2(b), 88 Stat. 1896, *reprinted in* Pet. App. 65a-109a.

To safeguard against invasion of individuals' privacy, the Act provides that an agency generally may not disclose information gathered about an individual to another agency or a third-party, "except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains" or pursuant to certain narrowly defined exceptions. 5 U.S.C. §§ 552a(b)(1)-(12).

To give these privacy safeguards added force, the Act authorizes a private right of action to redress four separate categories of agency misconduct. 5 U.S.C. §§ 552a(g)(1)(A)-(D). Section 552a(g)(1) then expressly waives the government's sovereign immunity from suit in such actions, and the Act makes separate provisions for the redress of each of those four enumerated categories of misconduct. *Id.* §§ 552a(g)(1)-(5).

Specifically, the Act authorizes a private right of action and waives the government's immunity from suit "[w]henever any agency. . . . fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual . . . ." *Id.* § 552a(g)(1)(D). This catch-all provision includes private civil actions for unlawful disclosures of information from one agency to another.

The Act further provides that "[i]n any suit" brought under subsections (g)(1)(C) or (g)(1)(D) "in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of"—

> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
>
> (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. § 552a(g)(4).

In *Doe v. Chao*, 540 U.S. 614, 618 (2004), this Court considered §§ 552a(g)(1)(C)-(D) and (g)(4). The Court held that a complainant must demonstrate that he or she has sustained some "actual damages" in order to be entitled to the minimum statutory award of $1,000. *Id.* The Court did not address, however, "the precise definition of actual damages" under subsection (g)(4) and cautioned that its decision should not be read to "suggest that out-of-

pocket expenses are necessary for recovery of the $1,000 minimum." *Id.* at 627 n.12.

B. Petitioners Intentionally And Willfully Disclose Confidential Information About Thousands Of Pilots, Including Mr. Cooper

In 2003, 2004, and 2005, agents of the Department of Transportation (DOT) and the Social Security Administration (SSA) disclosed and exchanged massive amounts of confidential information in Federal Aviation Administration (FAA) and SSA records pertaining to thousands of pilots (including Mr. Cooper). These disclosures were part of an investigation known as "Operation Safe Pilot" (OSP), and they were made with intentional and willful disregard of the Act's safeguards. For example, the agencies did not provide required notice to, or obtain written consent from, any pilot. The investigators also disclosed agency records without written requests from, or approval by, their respective agency heads—in contravention of the Act's carefully drawn exception for exchanges pursuant to legitimate "civil or criminal law enforcement activity," 5 U.S.C. § 552a(b)(7). Pet. App. 16a-17a, 40a-41a.

When OSP was proposed, certain SSA agents and counsel raised concerns that such wide-ranging, cross-agency exchanges would violate the Privacy Act. But, rather than complying with the law, the SSA drafted internal procedures intended to circumvent the Act's requirements. These proposed procedures did not comply with the Act and, in any event, were disregarded immediately by federal agents implementing OSP. Pet. App. 41a. Because of

these failings, extensive confidential information was unlawfully disclosed by each agency. Pet. App. 17a-18a, 42a-44a (noting the disclosure of FAA records of approximately 45,000 pilots and SSA records of a subset of that group).

These illegal disclosures included confidential information pertaining to Mr. Cooper. He was targeted because he properly claimed Social Security disability benefits at one time, but failed to disclose that he was HIV-positive on FAA medical certification forms. Pet. App. 15a, 17a-18a, 43a-44a. Without regard for the Privacy Act, these agency-to-agency disclosures included: (1) Mr. Cooper's Social Security number and other identifying information; (2) the Social Security diagnosis code that indicated that he was HIV positive; and (3) his complete Social Security disability file, including more than 230 pages of medical records provided in confidence to the SSA. Pet. App. 16a-18a, 42a-45a.

C. Mr. Cooper Suffers Severe Mental And Emotional Distress As A Result Of Petitioners' Unlawful Disclosures

In March 2005, DOT agents confronted Mr. Cooper in a coffee shop with a complete copy of his Social Security disability file, including his medical records. Pet. App. 18a, 44a-45a.

When Mr. Cooper learned that information contained in his file had been disclosed to DOT agents, he was devastated. His declaration, as well as those from four friends who personally observed him, and an expert psychiatrist, substantiated his claim of real and appreciable mental and emotional injury. Pet. App. 59a-61a.

In fact, his distress was so severe that it had consequences for his mental health, physical condition, relationships, and ability to function, including sleeplessness, loss of appetite, physical tension, agitation, isolation from friends, and anxiety. Mr. Cooper's anxiety also prevented him from utilizing his natural sources of psychological support and seeking professional care (and thus incurring the type of pecuniary injury that Petitioners contend would be sufficient to support a suit). Ultimately, he was diagnosed as suffering from an anxiety disorder with many of the debilitating symptoms of acute distress disorder. *Id.*

D. The District Court Finds Privacy Act Violations And Evidence Of Intentionality And Willfulness, But Rules That "Actual Damages" Does Not Encompass Compensation For Proven Mental Or Emotional Distress

Mr. Cooper accepted responsibility for his failure to disclose his HIV status, pleading guilty to a single misdemeanor for making a false official writing.[1] He firmly believed, however, that Petitioners *also* should be held accountable because the Act expressly prohibited *their* cross-agency disclosures of his confidential records. Mr. Cooper thus brought a suit under 5 U.S.C. § 552a(g)(1)(D), seeking damages for

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[1] Following his guilty plea, Mr. Cooper applied with the FAA for re-certification as a private pilot. The FAA conducted a review of his entire medical history, including information about his HIV diagnosis and treatment, and re-issued his private pilot certificate and airman medical certificate.

his severe mental and emotional injuries. Pet. App. 18a-19a.

On cross-motions for summary judgment, the district court held: (1) Petitioners violated the Act by illegally exchanging information from FAA and SSA disability files; (2) there was a triable issue of fact on whether Petitioners' violations were intentional or willful; and (3) Mr. Cooper had shown that he sustained real and appreciable mental and emotional injury from the violation. Pet. App. 18a-19a, 46a-61a. The court nevertheless entered summary judgment against Mr. Cooper on the ground that evidence establishing his various mental and emotional injuries could not, as a matter of law, establish "actual damages" under § 552a(g)(4). Pet. App. 19a, 61a-64a.

E. The Court Of Appeals Holds That "Actual Damages" Encompasses Proven Mental Or Emotional Distress Caused By An Intentional Or Willful Privacy Act Violation

The court of appeals reversed and remanded for further proceedings. It found that the district court failed to consider the "full panoply of sources available to it" for evaluating the meaning of the term "actual damages" in context. Pet. App. 34a. Applying established principles of statutory construction, the court considered: the plain meaning of the term "actual damages" in isolation; the term as it appears in the context of the entire Act; relevant precedents from this Court concerning invasions of privacy and defamation, as well as common law authorities; the construction of other federal statutes that provide monetary awards for "actual damages"

caused by violations of statutory privacy rights; and other traditional canons of construction, including the canon of sovereign immunity. Pet. App. 22a-36a.

Against that backdrop, the panel unanimously held that Petitioners' narrow construction of "actual damages" was not plausible; "actual damages" was unambiguous when read in the context of the Privacy Act; and Congress clearly intended to provide a monetary award for both pecuniary and nonpecuniary damages that are proven to have been caused by an agency's intentional or willful violation. Pet. App. 36a-37a.

Petitioners sought rehearing and rehearing en banc. The court issued an amended opinion (deleting a footnote not relevant here) and two separate opinions respecting the denial of rehearing en banc. Pet. App. 1a-14a. Judge Diarmuid F. O'Scannlain, joined by seven other judges, dissented from the denial of rehearing en banc. Pet. App. 8a-14a. Judge Milan D. Smith, Jr., the author of the panel decision, responded in a concurrence in the order denying rehearing en banc. There, he specifically noted why the panel's decision was consistent with controlling precedents, supported by multiple parts of the express statutory text, and in harmony with this Court's reasoning in *Doe*. Pet. App. 3a-8a.

SUMMARY OF ARGUMENT

The single question for this Court's resolution is whether a plaintiff can establish "actual damages" under the Privacy Act through competent evidence of real and appreciable mental or emotional distress caused by an intentional or willful violation of the

statute. Under settled principles of statutory construction, the answer to that question is yes.

To begin with, the plain meaning of "actual damages," as evidenced by non-legal and legal dictionaries in use in 1974, is a reparation in money for an actual injury to a legally protected right, as distinct from "nominal," "presumed," "liquidated," or "exemplary" damages. This plain meaning clearly encompasses compensation for proven mental or emotional distress.

That plain meaning is confirmed by the Act's statement of purpose and its substantive requirements which show that: (1) Congress intended to subject agencies "to civil suit for any damages which occur as a result of willful or intentional action . . . ;" (2) the Act aims to prevent "embarrassment;" and (3) "[w]henever any agency" violates subdivision (g)(1)(D) "in such a way as to have an adverse effect on an individual, the individual may bring a civil action . . . ." Privacy Act, § 2(b)(6); 5 U.S.C. §§ 552a(e)(10), (g)(1)(D).

A similar meaning and conclusion follow from the "cardinal rule" of construction that holds that when Congress borrows legal terms of art from common law tradition, it presumably adopts the meaning attached to each borrowed word and the body of learning from which it was taken. *Morisette v. United States*, 342 U.S. 246, 263 (1952). The term "actual damages" entered the American legal lexicon long ago, and it was defined succinctly by this Court in *Birdsall v. Coolidge*, 93 U.S. 64 (1876), as meaning "the same thing" as "[c]ompensatory damages"—*i.e.*, "compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him from

the defendant." In 1974, the common law regularly awarded actual damages, including compensation for proven mental or emotional distress, in cases of invasion of privacy and defamation by libel and slander per se. Thus, giving "actual damages" the meaning those words would have in the body of learning from which they were taken, the term authorizes compensation for any real or substantial mental or emotional distress sustained by an individual as a result of an intentional or willful violation of the Act's privacy requirements.

The same interpretation follows under all other relevant principles of construction. At the Privacy Act's inception, courts had construed recently enacted statutes authorizing "actual damages" for violations of federal civil rights and record-keeping requirements to include compensation for real or substantial mental or emotional distress. These contemporaneous statutes and judicial precedents further substantiate that when Congress authorized recovery of "actual damages" under the Act, it plainly intended to authorize compensation for real or appreciable emotional distress.

In fact, because mental or emotional distress is the frequent, natural, and primary consequence of an invasion of privacy, it is more notable that Congress did not use any language limiting "actual damages" to proven pecuniary damages. In statutes before and after the Privacy Act, Congress has subjected the government to liability for actual or compensatory damages for proven mental or emotional distress. In contrast, when Congress has intended to limit federal liability for actual damages to pecuniary injuries, it typically has directed that result expressly in the

statutory text. Yet, even though Congress knew that emotional distress was a well-recognized form of "actual damages" for invasions of privacy, Congress included no such language restricting "actual damages" to pecuniary injuries.

Finally, because the Act includes an express waiver of sovereign immunity authorizing civil suits against federal agencies for monetary relief, a court should be reluctant to narrow the scope of the express waiver that Congress provided. And that step certainly should not be taken without a firm grounding in the text of the statute and a clear directive from Congress to do so. Both are absent here. Accordingly, if the Privacy Act's "actual damages" provision is to be limited, it is Congress, not the judiciary, that should direct that result.

Petitioners disagree and urge the Court to limit "actual damages" to proven pecuniary loss. But their arguments do not account for the full text of the statute, the common meaning of the term as evidenced in legal or non-legal dictionaries, treatises, or the many precedents in existence in 1974. Nor do they account for the established construction of contemporaneous statutes with similar purposes or subsequently enacted statutes that reinforce a broader construction.

Instead, Petitioners simply *declare* that "actual damages" is an ambiguous term, *assume* that its meaning cannot be grasped using traditional tools of statutory construction, and *argue* that, because of the sovereign immunity canon, the term must be limited to out-of-pocket loss. Simply put, this litany does not align with settled principles of construction.

Indeed, Petitioners have advanced this argument before, and this Court has refused to accept it. To begin with, the sovereign immunity canon does not displace the other tools of statutory construction. Furthermore, because established principles of construction reveal here that Congress intended to provide compensation for proven mental and emotional distress, the sovereign immunity canon cannot be invoked to sanction Petitioners' statutory rewrite. Petitioners' remaining arguments based on legislative history and the post-enactment opinions of a federal commission also cannot override the result that recognized principles of statutory construction compel.

ARGUMENT

The Privacy Act's "Actual Damages" Provision Authorizes Compensation For Proven Mental Or Emotional Distress

Subsection 552a(g)(4) of the Privacy Act subjects the United States to civil liability for "actual damages" sustained by an individual as the result of an intentional or willful violation. Established principles of statutory construction—beginning with the plain meaning of the term, common law tradition, and the construction of contemporaneous statutes with similar purposes—all compel that the term "actual damages" be construed to authorize compensation for proven mental or emotional distress. Efforts to rewrite the term to mean "pecuniary loss" contravene these principles and should be rejected.

A. When Congress Enacted The Privacy Act, The Plain Meaning Of "Actual Damages" Encompassed Compensation For Proven Mental Or Emotional Distress

1. The starting point for the analysis of "actual damages" in § 552a(g)(4) is the plain, ordinary, and contemporary meaning of the words used by Congress, read "in context" and with a view to the "place" of the words "in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)) (FDA regulatory authority); *Kosak v. United States*, 465 U.S. 848, 853 (1984) (Federal Tort Claims Act's construction); *Richards v. United States*, 369 U.S. 1, 9 (1962) (same). If the words are unambiguous when given their plain, ordinary, and contemporary, meaning the Court's task is finished. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

2. When Congress drafted and enacted the Privacy Act, *Webster's Third New International Dictionary* defined the term "actual" as describing something that "exist[s] in fact or reality." *Webster's Third New International Dictionary* 22 (1971). *Black's Law Dictionary* similarly defined "actual" as "[r]eal" and "substantial" and "having a valid objective existence" as opposed to something "nominal," "constructive," or "theoretical." *Black's Law Dictionary* 53 (1951).

"Damages," in turn, was defined as an "estimated reparation in money for detriment or injury . . . caused by a violation of a legal right." *Webster's Third New International Dictionary* 571; *see also*

Black's Law Dictionary 466 (defining "damages" in similar terms); Dan B. Dobbs, *Handbook on the Law of Remedies* § 3.1 at 135 (1st ed. 1973) (defining "damages" as a money award provided by a court to one who suffers an injury as a result of an invasion of a legally protected right or interest).

3. Thus, when Congress drafted and enacted the Privacy Act, the phrase "actual damages" simply meant an estimated reparation in money for a real and substantial detriment or injury caused by the intentional or willful violation of a protected legal right or interest. This plain meaning stood in contrast to measures of damages that are not based on real and substantial injuries—*i.e.*, damages that are "nominal," "constructive," or "theoretical." Congress therefore plainly embraced and authorized compensation for *any* real and substantial detriment or injury, including proven mental or emotional distress.

4. This plain, ordinary, and contemporary meaning of "actual damages" is further confirmed by reading the Act's civil liabilities provision in context with the Act's statement of purpose and its substantive requirements.

a. Section 2(a) begins with a statement concerning the circumstances that made it "necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by [federal] agencies." § 2(a), 88 Stat. 1896, *reprinted in* Pet. App. 65a-66a. Congress found that:

- "the right to privacy is a *personal* and *fundamental* right protected by the Constitution of the United States;"
- "the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;"
- "the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has *greatly magnified the harm to individual privacy* that can occur from any collection, maintenance, use, or dissemination of personal information;" and
- "the opportunities for an individual to secure employment, insurance, and credit, and *his right to due process, and other legal protections* are endangered by the misuse of certain information systems[.]"

Id. (emphasis added).

In section 2(b), Congress was equally definitive in stating that "[t]he purpose of this Act is to provide certain safeguards *for an individual* against an invasion of *personal privacy* by requiring Federal agencies, except as otherwise provided by law, to—"

- "permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;"
- "prevent records . . . obtained by such agencies for a particular purpose from being used or made available for another purpose without

[the] consent [of the individual to whom the record pertains];"

- "permit an individual to gain access to information pertaining to him in the Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;"
- "collect, maintain, use, and disseminate any record of identifiable personal information in a manner" that "prevent[s] misuses of such information;" and
- "be subject to civil suit for *any* damages which occur as a result of willful or intentional action which violates any individual's rights under this Act."

Id. (emphasis added).

Although Petitioners contend that section 2 is "generally worded," "generic," "ambiguous," not "controlling," and "no[t] even accurate" in its description of the statute's substantive and remedial provisions (Pet. Br. 37-38), this Court cannot so summarily dismiss or marginalize this duly enacted statutory language. On the contrary, "[i]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Doe*, 540 U.S. at 630-31 (internal quotations omitted).

Moreover, section 2(a) confirms that, when it passed the Act, Congress was concerned with "harm" to dignitary interests in privacy—interests that it understood to be "personal," "fundamental," and "protected" by the Constitution. Section 2(a) also

shows that Congress believed the Act was "necessary and proper" to protect and redress not only pecuniary injuries to "opportunities" for "employment, insurance, and credit[,]" but also intangible, nonpecuniary injuries including violations of the "right to due process," and "other legal protections" flowing from "the misuse of government information systems."

Finally, each of the "safeguards" described in section 2(b) corresponds *directly* not only to particular substantive requirements in the Act, but also to the four categories of agency misconduct addressed by its remedial provision. The last of these "safeguards" (described in section 2(b)(6)) is the requirement that federal agencies "be subject to civil suit for *any* damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." This is an unmistakable reference to civil suits for monetary awards brought under *either* subsection (g)(1)(C) *or* subsection (g)(1)(D). It also is a clear statement of Congress's intent to provide compensation for the natural or primary injuries that are proven to result from those types of agency misconduct.

b. Section 3 also demonstrates Congress's intent to both protect and redress nonpecuniary interests and harm. For example, one part of section 3 requires that an agency maintain "all records" used by the agency "in making *any* determination" about an individual in a manner that reasonably "assure[s] *fairness* to the individual in the determination." *See* 5 U.S.C. § 552(a)(e)(5) (emphasis added). Another part likewise instructs agencies to "establish appropriate administrative, technical, and physical safeguards"

to "protect" against "threats" that could result in both pecuniary and nonpecuniary "harm," including "*embarrassment*, *inconvenience*, or *unfairness* to any individual on whom information is maintained." *Id.* § 552a(e)(10) (emphasis added). An intentional or willful violation of either duty by an agency is sufficient to trigger civil liability for "actual damages" under the Act. 5 U.S.C. § 552a(g)(1)(C)-(D) and (g)(4).

In short, the plain, ordinary, and contemporary meaning of the words "actual damages" expresses Congress's approval of monetary compensation for *any* real and substantial injury caused by the intentional or willful violation of the protected privacy rights and interests. Sections 2 and 3 of the Act, in turn, underscore that Congress sought to protect *both* pecuniary interests *and* nonpecuniary interests through the statute, expressly *including* the Act's civil liability provision. Nothing more is needed to hold that the "actual damages" provision authorizes compensation for proven mental or emotional distress caused by the Act's intentional or willful violation.

B. Recognized Principles Of Construction Reinforce That The Privacy Act's "Actual Damages" Provision Authorizes Compensation For Proven Mental Or Emotional Distress

If the Court elects to go beyond the plain meaning of the words "actual damages," recognized principles of statutory construction reinforce and confirm that "actual damages" authorizes compensation for proven mental or emotional distress.

1. Construing "Actual Damages" To Authorize Compensation For Proven Mental Or Emotional Distress Comports With Common Law Tradition

a. A "cardinal rule" of statutory construction, both now and in 1974, holds that:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Morissette v. United States, 342 U.S. 246, 263 (1952), *quoted in Molzof v. United States*, 502 U.S. 301, 307 (1992).

As this Court has noted, this rule carries "particular force" in cases where Congress has waived the United States' sovereign immunity from suit and subjected the United States to liability for monetary exactions using common legal terms. *Molzof*, 502 U.S. at 307 (construing the FTCA and the liability of the government for damages other than "punitive damages").

b. Here, the construction of the Act's "actual damages" provision as authorizing compensation for proven mental or emotional distress is consistent

with these rules of construction and a reading of "actual damages" as a legal term borrowed from the common law torts of defamation and invasion of privacy.

The term "actual damages" itself entered the American legal lexicon long before Congress used the term in subsection (g)(4) of the Privacy Act. In 1876, in *Birdsall*, 93 U.S. at 64, this Court was asked to construe the term "actual damages" appearing in two statutes that were applicable to claims for patent infringement, and the Court defined the term "actual damages" succinctly and unequivocally as "mean[ing] the same thing" as "[c]ompensatory damages"—*i.e.*, "compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him from the defendant." *Id.* (construing 5 Stat. 123 and 16 Stat. 207).

Although the term "actual damages" sometimes has been used by courts in passing to describe particular damages awards in various cases of pecuniary and nonpecuniary injury, the basic "concept" of "actual damages" has a "long pedigree in the law" as being synonymous with the concept of "compensatory damages." *Molzof*, 502 U.S. at 306. Thus, as the plain meaning of "actual damages" would suggest, the term describes an amount awarded to a plaintiff in *compensation* for a proven injury proximately caused by a violation of a legally protected interest or right. *Id.*

Legal dictionaries in use at the time of the Privacy Act defined "actual damages" in much the same way as this Court did in 1876 in *Birdsall*. For example, the leading legal dictionary at the time gave the following definition:

> Real, substantial and just damages, or the amount awarded to a complainant in *compensation* for his *actual* and *real* loss or injury, as opposed, on the one hand to "nominal" damages, and on the other to "exemplary" "or "punitive" damages.

Black's Law Dictionary 467 (1951) ("Actual Damages" as defined under "DAMAGES") (noting that "actual damages" is "synonymous with 'compensatory damages'") (emphasis added); *id.* (defining "compensatory damages as an amount awarded to compensate the injured party for the injury sustained and nothing more").[2]

Other contemporaneous treatises also defined "actual damages" as being synonymous with "compensatory damages" and distinguished the term from other types of "damages" that do not aim to *compensate* a plaintiff for proven injury or loss to a legally protected right or interest (including "nominal damages," "liquidated damages," and "punitive

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[2] *Black's* states that "actual damages" also could be read synonymously with "general damages." *Id.* More precisely, actual or compensatory damages could be subdivided into "general" or "special" damages. *See* Dobbs, *Handbook on the Law of Remedies* §§ 3.1, 3.2 (describing general and special damages as forms of compensatory damages). *Black's* does not state, however, that "actual damages" can be read synonymously with "special damages," as Petitioners' would have it here. "Special damages" were discreet, routinely defined separately in non-legal and legal dictionaries, and subject to heightened standards of pleading and proof. *See, e.g.*, *Webster's Third New International Dictionary* 2186 (1971) (defining "special damages"); *Black's Law Dictionary* 469 ("Special Damages" as defined under "DAMAGES"); Dobbs, *Handbook on the Law of Remedies* §§ 3.1, 3.2 (same).

damages"). *See, e.g.*, *Weider v. Hoffman*, 238 F. Supp. 437, 445 (M.D. Pa. 1965) (analyzing "actual damages" in a state-law libel action and quoting from 25 C.J.S. Damages § 2); *Morehead v. Lewis*, 432 F. Supp. 674, 678 (N.D. Ill. 1977) (construing "actual damages" as used in the Civil Rights Act of 1968, section 812(c)) (citing 22 Am. Jur. 2d Damages § 11 (1965) and 25 C.J.S. Damages § 2 (1966) and noting that actual damages "[g]enerally . . . is understood in the law [as] synonymous with compensatory damages and as meaning substantial as distinguished from nominal"), *aff'd*, 594 F.2d 867 (7th Cir. 1979); *McMillian v. FDIC*, 81 F.3d 1041, 1055 n.15 (11th Cir. 1996) (quoting 25 C.J.S. Damages § 2 (1966)) ("According to Corpus Juris Secundum, '"Compensatory damages" and "actual damages" are synonymous terms . . . and include[ ] all damages other than punitive or exemplary damages.'").

c. In addition, at the time of the Privacy Act's enactment, the common law: (1) recognized mental suffering and emotional distress to be the natural and primary injuries that result from acts of defamation by libel and invasions of privacy; and (2) regularly issued awards for actual or compensatory damages to redress proven mental or emotional distress. *See* Restatement (First) of Torts §§ 867 (interference with privacy), 903 (compensatory damages), 905 (compensatory damages for nonpecuniary harm); Restatement (Second) of Torts § 652H(b) and cmt. b (compensatory damages for "proved" mental distress "of a kind that normally results from such invasion"); Dobbs, *Handbook on the Law of Remedies* §§ 7.1-7.4 at 509-39 (1973).

For example, in one of the earliest cases of tort for an invasion of "a legal right to . . . privacy," *De May v. Roberts*, 9 N.W. 146, 149 (Mich. 1881), the Michigan Supreme Court held that an intrusion into the privacy of a medical patient giving birth at home entitled "the injured party to recover the damages afterwards sustained, from shame and mortification upon discovering the true [nonprofessional and unmarried] character of the defendants." *See also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 196 (1890) (arguing that the remedies for an invasion of privacy should be modeled after the common law of defamation, including "substantial compensation . . . for injury to feelings as in the action of slander and libel" "[e]ven in the absence of special [*i.e.*, pecuniary] damages.")

Other cases from the same era involving acts of defamation by libel describe the meaning of "actual damages" as a synonym for "compensatory damages" in greater detail:

> Two classes of damages may be recovered in actions of libel, to wit, [1] actual or compensatory damages and [2] exemplary damages. Special damages, as a branch of actual damages, may be recovered when actual pecuniary loss has been sustained, and is specially pleaded. The remaining branch of actual damages embraces recovery for loss of reputation, shame, mortification, injury to feelings, etc.; and, while special damages must be alleged and proven, general damages for outrage to feelings and loss of reputation need not be alleged in detail, and may be recovered in the absence

> of actual proof, and to the amount that the jury estimates will fairly compensate plaintiff for the injury done.

Childers v. San Jose Mercury Printing & Publ'g Co., 38 P. 903, 904 (Cal. 1894); *see also Osborn v. Leach*, 47 S.E. 811 (N.C. 1904) (same); *Van Norman v. Peoria Journal-Star, Inc.*, 175 N.E.2d 805, 811 (Ill. App. Ct. 1961) (although common law presumes damages to reputation from libel, the fact-finder's duty in a given case is to determine "actual damages sustained by the plaintiff, if any, by consideration of all of the evidence with respect thereto").

The extant common law tradition of protecting privacy and other dignitary interests through compensatory awards for proven mental or emotional distress also is reflected in this Court's own decisions in *Time, Inc. v. Hill*, 385 U.S. 374, 385 n.9 (1967), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974).

Thus, in *Time, Inc.*, 385 U.S. at 387-88 (decided seven years before the passage of Privacy Act), analyzing a First Amendment challenge to an action under a New York privacy statute, the Court noted the close relationship between the dignitary interests protected in defamation and privacy cases and observed that, in "right of privacy cases, the *primary* damage is the mental distress from having been exposed" to others involuntarily. *Id.* at 385 n.9 (emphasis added).

Similarly, in *Gertz*, 418 U.S. at 349 (decided six months before the passage of the Privacy Act), the Court held that, in a private individual's action

against a publisher for a libel that involved a matter of public concern, the First Amendment prohibited awards for presumed and punitive damages for false and defamatory statements unless the plaintiff showed "actual malice"—*i.e.*, knowledge of falsity or reckless disregard for the truth. However, *Gertz* recognized that substantial money damages could be awarded for libel, without proof of actual malice, to compensate a plaintiff for an "*actual injury*" "supported by competent evidence." *Id.* at 349-50 (emphasis added). And *Gertz* made clear that compensatory awards for "actual injury" need not be "limited to out-of-pocket loss." *Id.* "Indeed," the Court stated that compensatory damages could be awarded for "the more *customary* types of *actual harm* inflicted by defamatory falsehood" including "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350 (emphasis added). In other words, "*Gertz* expressly held that . . . a showing of simple fault sufficed to allow recovery of *actual damages*" including proven mental or emotional distress. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774 (1986) (emphasis added).

Cantrell, 419 U.S. at 248, 252, decided a few days before the passage of the Act, also reflects the common meaning of "actual damages" as including compensation for proven mental or emotional distress. There, the Court upheld an award of "actual" or "compensatory" damages, including "outrage, mental distress, shame, and humiliation" issued under Ohio's "false light" theory of invasion of privacy and used the terms "actual damages" and "compensatory damages" interchangeably when

describing the plaintiff's request for relief and the ensuing award. *Id.*

In sum, in using the term "actual damages" in the Privacy Act, Congress borrowed a legal term of art whose common meaning had been defined and widely understood for at least ninety-eight years as being synonymous with compensatory damages and as authorizing recovery for real and substantial injuries, including proven mental or emotional distress, sustained as a result of an invasion of privacy or defamation by libel or slander per se. Accordingly, to the extent that this Court goes beyond the plain meaning of the words "actual damages," it should read "actual damages" in light of the extant common law tradition when Congress enacted the Act. Indeed, "there is no warrant for assuming that Congress was unaware of established tort definitions" when it enacted the Privacy Act. *Molzof*, 502 U.S. at 305-07 (citing cases).

2. *Construing "Actual Damages" To Authorize Compensation For Proven Mental Or Emotional Distress Comports With The Contemporaneous Construction Of Other Federal Statutes*

a. Another cardinal principle of construction provides that when Congress "uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979) (Congress

legislates with full recognition of existing jurisprudence). This principle also carries particular force in the construction of statutes that waive sovereign immunity from suit and subject the United States to monetary exactions. *See Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589-90 (2008) (federal liability for "fees" and "other expenses" under the Equal Access to Justice Act).

b. Once again, construction of the Act's "actual damages" provision as authorizing compensation for proven mental or emotional distress is consistent with this rule of construction as well. The Privacy Act was not the first statute to subject the United States to liability for proven mental or emotional distress. In 1946, Congress enacted the Federal Tort Claims Act (FTCA) which provides in relevant part that:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674 (first paragraph). This paragraph has been construed to (1) subject the United States to liability for actual or compensatory damages or any other form of legal damages other than "punitive damages" and (2) borrow terms and concepts from the common law tradition in existence in 1946. *See, e.g., Molzof*, 502 U.S. at 305-08 (construing "punitive damages" for purposes of the FTCA as a legal term borrowed by Congress from common law tradition and defining the term based on the conduct and culpability of the defendant, as opposed to "actual or

compensatory damages" based on "actual loss" sustained by the plaintiff).

Although § 2674's first paragraph does not expressly subject the United States to liability for actual or compensatory damages for nonpecuniary injuries, it has been understood by the government *and this Court to provide for precisely that result*. Thus, at the time of the Privacy Act, under the first paragraph of § 2674, the United States already had been held liable in tort for "actual damages," including proven mental or emotional distress. *E.g.*, *Kapuschinsky v. United States*, 259 F. Supp. 1, 6-8 (D.S.C. 1966) (after previously finding the government liable, holding, with respect to damages, that "[p]laintiff shall have judgment for *actual (compensatory) damages*," including "pain and suffering [and] psychological damage" proven by the evidence) (emphasis added). *See also Calva-Cerqueira v. United States*, 281 F. Supp. 2d 279, 282 (D.D.C. 2003) (using "actual damages" and "compensatory damages" interchangeably; holding the government liable; and awarding damages to compensate for, *inter alia*, proven pain, suffering, mental anguish, and emotional distress).

Indeed, the government itself noted in *Molzof* that, under this first paragraph, "the government *regularly* pays awards for *non-pecuniary* but nevertheless *compensatory* damages (such as damages for *pain and suffering*, *loss of consortium*, or infliction of *emotional distress*)." Brief for the United States 19 n.13, *Molzof v. United States*, No. 90-838 (1991) (emphasis added); *see also Molzof*, 502 U.S. at 309 (*noting this concession*).

Three years after the FTCA's enactment, Congress added a second paragraph to § 2674 addressing the government's liability in actions for wrongful death occurring in places where state law had been construed to provide only for punitive damages. This amendment subjected the United States to liability for "actual or compensatory damages" in such actions. 28 U.S.C. § 2674 (second paragraph). In this amendment, Congress did not define the phrase "actual or compensatory damages." Congress recognized, however, that "actual or compensatory damages" were synonyms whose common meaning included compensation for real and substantial mental or emotional distress in cases of wrongful death. Yet, Congress did not elect to extend federal liability that far and thus it directed a special "pecuniary" measure for "actual or compensatory damages" in those particular cases—*e.g.*, "actual or compensatory damages, measured by the pecuniary injuries resulting from such death." *Id.*; *Molzof*, 502 U.S. at 309 (noting that this particular "pecuniary injuries" measure does not apply in any other FTCA action for actual or compensatory damages).

A review of § 2674 thus confirms that, prior to the Privacy Act: (1) the terms "actual damages" and "compensatory damages" had been used by Congress as synonymous legal terms providing compensation for any real or substantial injury caused by a violation of a right or legally protected interest; and (2) in those instances when Congress thought it appropriate to limit federal liability for "actual damages" to cases of proven pecuniary loss, it directed that result expressly and unequivocally in statutory text.

c. Nineteen years after the amendment to § 2674, Congress used the term "actual damages" again in the remedial provision of Title VIII of the Civil Rights Act of 1968. *See* Civil Rights Act of 1968, Pub. L. 90-284, Title VIII, § 812(c), 82 Stat. 81, 88 (Apr. 11, 1968) (enacting what is now known as the Fair Housing Act (FHA)) (originally codified at 42 U.S.C. § 3612(c); presently codified as amended at 42 U.S.C. § 3613(c)). This Civil Rights Act's purpose was to recognize and protect individual rights to housing and to prohibit discrimination in housing on the basis of race, color, religion, or national origin. *Id.* §§ 803-06. To this end, the Civil Rights Act's remedial provision authorized a cause of action for "actual damages" sustained as a result of unlawful housing discrimination. *Id.* § 812(c).

Two years later, in 1970, Congress again used the term "actual damages" in a remedial provision of the Fair Credit Reporting Act (FCRA). Fair Credit Reporting Act, Pub. L. 90-321, Title VI, § 617, *as added by* Pub. L. 91-508, Title VI, § 601, 84 Stat. 1134 (Oct. 26, 1970) (codified as amended at 15 U.S.C. § 1681o). The FCRA's purpose was "to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.* § 602. Thus, the FCRA regulated the maintenance and use of consumer credit reports and authorized a cause of action for "actual damages" for FCRA violations. *Id.* § 617.

Both the 1968 Civil Rights Act and the FCRA: (1) were enacted in close proximity to the Privacy Act; (2) sought to recognize and protect individual civil rights, including individual privacy interests, that

Congress understood to be personal, fundamental, and rooted in the Constitution; and (3) authorized compensation for "actual damages" in the ordinary legal sense of that term without providing any special definition or qualification. And, prior to the Privacy Act, the "actual damages" provisions in each statute had been construed to be synonymous with "compensatory damages" to authorize compensation for real and substantial injuries caused by violations of the rights protected in that statute, including proven mental or emotional distress.

For example, in *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 350-51 (7th Cir. 1970), the Seventh Circuit directed entry of a monetary award for "actual damages" under section 812(c) of the Civil Rights Act of 1968 in an amount that would "fairly and properly compensate" the plaintiff for proven mental anguish sustained as a result of unlawful housing discrimination. *See also Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636-37 (7th Cir. 1974) (confirming that an award for "compensatory damages" under 42 U.S.C. § 1982 and "actual damages" under section 812(c) of the FHA could include an amount that would compensate the plaintiff for proven mental anguish sustained as a result of unlawful housing discrimination); *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119, 1121 (7th Cir. 1974) (same).

Likewise, in *Steele v. Title Realty Co.*, 478 F.2d 380, 384 (10th Cir. 1973), another case arising under section 812(c) of the Civil Rights Act of 1968, the Tenth Circuit held that "actual damages" includes compensation for proven nonpecuniary injuries,

including mental or emotional distress sustained as a result of unlawful housing discrimination.

In *Williams v. Matthews Co.*, 499 F.2d 819, 829 (8th Cir. 1974), the Eighth Circuit similarly directed the entry of a monetary award for "actual damages" under section 812(c) of the FHA in an amount that would "properly compensate" the plaintiff for proven "humiliation" suffered due to housing discrimination.

Finally, prior to the Privacy Act's enactment, federal district courts also had construed the term "actual damages" as it appeared in section 812(c) of the 1968 Civil Rights Act and as it appears in section 617 of the FCRA, as authorizing an award for proven mental or emotional distress. *See, e.g., Stevens v. Dobs, Inc.*, 373 F. Supp. 618, 622 (E.D.N.C. 1974) ("actual damages" section 812(c) of the Civil Rights Act of 1968); *Millstone v. O'Hanlon Reports, Inc.*, 383 F. Supp. 269 (E.D. Mo. 1974) ("actual damages" under the FCRA is compensatory and includes compensation for nonpecuniary injuries), *aff'd*, 528 F.2d 829 (8th Cir. 1976).[3]

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[3] Petitioners note that this Court has never interpreted the FCRA's "actual damages" provision, and they contend that its meaning was unsettled when the Privacy Act was enacted. Pet. Br. 42. But they cite no decision contrary to *Millstone*. Indeed, *Millstone*'s construction of the FCRA's "actual damages" provision is not an aberration. *E.g., Sloane v. Equifax Info. Servs., LLC*, 510 F.3d 495, 500 (4th Cir. 2007); *Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469, 473 (2d Cir. 1995); *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995); *Thompson v. San Antonio Retail Merchs. Ass'n*, 682 F.2d 509, 513 (5th Cir. 1982). In any event, the settled presumption is that when Congress borrows a term that it recently has used in similar statutes and that term has been

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In sum, at the time of the Privacy Act, courts uniformly had construed the "actual damages" provisions of the 1968 Civil Rights Act and the FCRA to encompass compensation for proven mental or emotional distress. Congress manifested no intent to give the term a different meaning in the Privacy Act. Accordingly, under settled principles of construction, Congress should be presumed to have intended that the Privacy Act's "actual damages" provision be given the same construction encompassing compensation for proven mental or emotional distress.

3. Construing "Actual Damages" To Authorize Compensation For Proven Mental Or Emotional Distress Comports With The Privacy Act's Express Sovereign Immunity Waiver

a. Because the Privacy Act provides an express waiver of sovereign immunity authorizing civil suits against Petitioners for monetary relief using a term—"actual damages"—borrowed from common law tradition and other statutes with similar purposes, the Act also is subject to the canon of construction that directs courts not "to assume the authority to narrow" the scope of the express waiver that Congress has provided. *United States v. Kubrick*, 444 U.S. 111, 118 (1979).

b. In particular, the text of §§ 552a(g)(1)(C)-(D) and (g)(4) expressly waives the government's

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judicially construed, Congress is presumed to have intended the construction given in the judicial precedents absent a contrary indication. That presumption applies here.

sovereign immunity and authorizes an award "in the amount of" the "actual damages" sustained. Given the express waiver and authorization for a monetary award, if the government's liability for "actual damages" is to be limited or curtailed, it is the function of Congress, not this Court, to direct that result. *Rayonier Inc. v. United States*, 352 U.S. 315 320 (1957); *see also Smith v. United States*, 507 U.S. 197, 203 (1993) (describing this principle of construction as a "canon:" reading the foreign-country exception to the FTCA to exclude torts committed in Antarctica; and rejecting the alternate construction advanced by the government); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) (applying the canon: holding that the time for filing an employment discrimination action against the federal government can be subject to equitable tolling; and rejecting the government's narrower interpretation of the statutory right of action); *Bowen v. City of New York*, 476 U.S. 467, 479 (1986) (same in action to challenge eligibility determinations of the Social Security Administration); *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955) (applying the canon in an action for negligence in the maintenance of a lighthouse and rejecting "finespun" and "capricious" statutory distinctions advanced by the government).

4. Construing "Actual Damages" To Authorize Compensation For Proven Mental Or Emotional Distress Avoids Arbitrary, Capricious, And Absurd Results

a. "[S]tatutes should be interpreted to avoid untenable distinctions and unreasonable results

whenever possible." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). Here, a construction of the Act's "actual damages" provision as authorizing compensation for proven mental or emotional distress would be reasonable and would avoid a construction that would result in arbitrary and capricious distinctions.

b. Here again, construing the Act's "actual damages" provision to authorize compensation for proven mental or emotional distress would provide plaintiffs with a remedy for the intangible harms that have long been understood by courts to be the natural and primary consequences of a violation of legally protected privacy interests. A more limiting construction of "actual damages," on the other hand, would deprive *all* individuals of *any* compensation for those types of injuries that are the primary, most natural, and most likely consequences of an intentional or willful violation of privacy rights—*i.e.*, real and substantial mental or emotional distress. Given the statute's express purpose to protect and vindicate individuals' privacy interests in personal information collected by federal agencies, that result would be absurd and implausible standing on its own.

c. There is more to consider. The Act *guarantees* any "person who is entitled to recovery" an award of no less than $1,000 *as well as* "the costs of the action together with attorney fees as determined by the court." 5 U.S.C. §§ 552a(g)(4)(A)-(B). In *Doe*, the Court indicated that *any* form of out-of-pocket or pecuniary loss could support a claim for "actual damages" under the Act and thus result in a recovery of no less than $1,000 plus costs and attorney fees as

provided by the statute. *See Doe*, 540 U.S. at 626 n.10 (noting that out-of-pocket losses for "running a credit report" or "a Valium prescription" could easily support a claim for "actual damages" under the Act).

Thus, a narrowing construction of "actual damages" would *deprive* claimants of any monetary compensation for mental or emotional distress, even when that injury is shown to be severe and debilitating, while *allowing* claims for at least $1,000 plus costs and attorneys' fees based on the miniscule pecuniary losses associated with a credit report or prescription drug co-pay.

d. Even if one assumes that, in 1974, Congress was concerned with limiting claims on the federal fisc and further assumes that this concern influenced the decision to make the United States liable for "actual damages" and not liquidated or punitive damages, a narrowing construction of the Act's "actual damages" provision would not be likely to have any meaningful effect on claims upon the federal fisc. It would simply create incentives for aggrieved individuals to incur small pecuniary losses as a basis for suit. *Doe*, 540 U.S. at 635-40 (Ginsburg, J., dissenting) (noting that out-of-pocket expenses are "easily arranged").

5. *Construing "Actual Damages" To Authorize Compensation For Proven Mental Or Emotional Distress Comports With The Privacy Act's Legislative History*

To the extent that this Court wishes to consult the Act's legislative history, it also confirms that "actual damages" encompasses the proven mental or emotional injuries that naturally result from privacy

invasions. *See generally* House Comm. on Gov't Operations and Senate Comm. on Gov't Operations, 94th Cong., 2d Sess., *Legislative History of the Privacy Act of 1974 -- S. 3418 (Pub. L. No. 93-579)* (1976) (*Legislative History*).[4]

a. In 1973 and 1974, members of Congress were concerned with the extent to which federal agencies were misusing records pertaining to individuals and invading individuals' privacy, and they concluded that legislation was required to protect personal privacy rights in such records. *See* 120 Cong. Rec. 36,900 (1974) (remarks of Sen. Nelson) ("[I]individual liberty has been eroded by an expanding web of snooping conducted at all levels of government . . . which make a mockery of the individual freedoms guaranteed by our Constitution.").

The legislative history shows that the members of Congress who drafted and enacted the Act (1) deliberately drew from the common law of torts generally and from the law of defamation and invasion of privacy more specifically; (2) intended the Act to prevent and redress harm to dignitary interests and rights to privacy protected by the Constitution; (3) were influenced particularly by contemporaneous decisions of this Court concerning privacy and civil rights; and (4) understood that the natural and primary consequences of invasions of privacy were intangible and nonpecuniary.

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[4] This report contains much of the Act's legislative history in one volume and is available on-line at http://www.loc.gov/rr/frd/Military_Law/pdf/LH_privacy_act-1974.pdf (visited Sept. 27, 2011).

As Senator Muskie remarked, the legislation considered by the House and Senate

> draws upon the constitutional and judicial recognition accorded to the right of privacy and translates it into a system of procedural and substantive safeguards against obtrusive Government information-gathering practices . . . .

120 Cong. Rec. 36,897. Senator Muskie then described provisions in the House and Senate legislation providing a private right of action for statutory violations, including compensation for "actual damages" as follows:

> [E]ach citizen would be entitled to enforce this right of access and challenge in a Federal district court and seek an award of damages for *injuries* resulting from the misuse of personal information.
>
> These are fundamental rights to be included in any privacy legislation and they should help begin to restore public faith in our Government's information practices."

Id. (emphasis added); *see also* 120 Cong. Rec. 9,382 (Rep. Burgener) (discussing an early bill as drawing from the "great common law tradition" and this Court's jurisprudence); *id.* at 12,646-47 (Sen. Ervin) (introducing the bill later enacted as the Privacy Act, referencing multiple constitutional precedents, and stating that the legislation advanced a right of privacy whose "significance" is to safeguard human "feelings" and "intellect" in addition to "material things"); *id.* at 32,849 (Sen. Nelson) (describing the legislation as protecting privacy rights that are

"essential to "[personal] peace and happiness"); *id.* at 36,893 (Sen. Percy) (referencing Warren & Brandeis's seminal 1890 law review article on the right to privacy).

b. During this period, each chamber of Congress considered and rejected several bills. Proposals that would have provided for liquidated damages of varying amounts were considered but rejected. *See* S. 2,810, 93d Cong., § 7(c)(1) (1973); S. 2,963, 93d Cong., § 308(e) (1974); S. 3,633, 93d Cong., § 11(b)(1) (1974); H.R. 13,872, 93d Cong., § 552a(g)(1) (1974); *Legislative History* 612, 647, 674, 733-34.

The Senate and House of Representatives moved forward in parallel on S. 3,418, 93d Cong. (1974) and H.R. 16,373, 93 Cong. (1974); *Legislative History*, 9-28, 239-257. As introduced, each bill would have allowed an individual to bring a civil action against certain defendants for "actual damages" and "punitive damages" for certain violations.

As introduced, H.R. 16,373 would have subjected agencies to civil liability for "actual damages" sustained by an individual as the result of a "negligent" violation of the Act and both "actual damages" and "punitive damages" in cases of a "willful" violation. H.R. 16,373, 93d Cong. § 3(f)(A)-(B) (1974); *Legislative History* 250-51.

However, the House Committee on Government Operations subsequently amended the bill to make liability for "actual damages" dependent on proof of "willful, arbitrary, or capricious conduct" and to eliminate the bill's "punitive damages" provision. *See* H.R. Rep. No. 93-1416, at 17-18, 31-32; *Legislative History* 310-11, 324-25. At least ten Congress

members objected to these amendments and called for the inclusion of a "liquidated damages" provision as well as the restoration of "punitive damages." H.R. Rep. No. 93-1416 at 37-38; *Legislative History* 329-30. Notwithstanding these objections, the Committee's mark-up of the bill subsequently was adopted by the full House. H.R. 16,373, 93d Cong. (as passed on Nov. 22, 1974); *Legislative History* 388.

As introduced, S. 3418 would have made any person who violated the Act subject to civil liability for "actual damages" sustained by an individual as a result of the violation and "punitive damages" where appropriate. S. 3418, 93d Cong., § 304(b) (1974); *Legislative History* 27. Prior to passage on November 21, 1974, S. 3418 was amended to make the United States liable for "actual damages" caused by a violation. 120 Cong. Rec. 36,890-92 (describing amendments). The day after the Senate passed S. 3418, it authorized a "correction[]" to the engrossed S. 3418 to allow plaintiffs to recover "actual and general" damages, but in no event less than $1,000, for "any" violation of the Act by any government officer or employee. 120 Cong. Rec. 37,085 (Sen. Byrd) (authorizing the correction); S. 3418, 93d Cong., § 303(c) (as passed on Nov. 21, 1974 and corrected on Nov. 22, 1974); *Legislative History* 371.

c. In the wake of this divergence, members of the House and Senate proceeded to negotiate an informal compromise that "retain[ed] the basic thrust of the House version but which also include[d] important segments of the Senate measure." 120 Cong. Rec. 40,880 (Rep. Moorhead). The compromise, in relevant part, subjected the United States to civil liability for

"actual damages" sustained as a result of an "intentional or willful" violation of the rights and protections duties described in § 552a(g)(1)(C)-(D), but provided those persons entitled to recovery a guaranteed minimum award, as well as costs and attorney fees as determined by the court.

While the remedial provisions of the Act were subject to revision and debate in the House and Senate, that debate concerned (1) the standard of culpability ("intentional or willful") and (2) whether to provide liability for types of damages that do not depend on proof of injury (including liquidated and punitive damages). No one remarked on the definition of the term "actual damages" or proposed an amendment that would have directed a specific "pecuniary" measure for that term akin to the measure for actual damages that had been enacted as part of the 1949 FTCA amendment.

d. Accordingly, the Act's drafting history further shows that Congress intended "actual damages" to be synonymous with "compensatory damages" and distinguished from types of damages that do not depend on proof of actual injury. The Congressional debates all assumed that the Act would authorize the compensatory damages ordinarily available at common law for proven injuries caused by invasions of privacy and centered on whether to provide for other damages measures untethered to proof of actual injury. *E.g.*, 120 Cong. Rec. 36,645 (Rep. Abzug) (discussing assessments of "actual damages" in contrast to "punitive damages"); *id.* at 36,955 (Rep. Moorhead) (noting that a citizen must prove a violation, then an "adverse determination," and then "damages caused by the violation"); *id.* at 36,658

(Rep. Fascell) (discussing an amendment to restore "punitive damages" and distinguishing "punitive damages" from "actual damages"); *id.* at 36,659 (Rep. McCloskey) (describing actual damages as "ordinary damages" and in contrast to "punitive damages").

C. Petitioners' Arguments Contravene Established Principles Of Construction And Fail To Account For The Privacy Act's Text, Structure, And Purpose

1. Petitioners' Reliance On The Sovereign Immunity Canon Is Misdirected

Petitioners begin with a seven-page recitation of the canon of statutory construction that states that a waiver of sovereign immunity must be unequivocally expressed in statutory text and construed strictly. Pet. Br. 12-19. The belaboring of this proposition is perplexing. There is no debate that the Act contains an express waiver of immunity from suit subjecting the United States to liability for "actual damages." To the extent that Petitioners appear to go further and urge that the sovereign immunity canon displace other tools of construction, their argument is a misdirection.

a. It is true that this Court typically requires a clear statement of a waiver of sovereign immunity and likewise requires a clear statement subjecting the United States to liability for monetary exactions. *See, e.g.*, *United States v. Sherwood*, 312 U.S. 584, 587-88 (1941) (waiver of immunity from suit); *Lane v. Pena*, 518 U.S. 187, 191 (1996) (monetary remedies); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34-

35 (1992) (same); *Library of Congress v. Shaw*, 478 U.S. 310, 314-15 (1986) (interest). Neither proposition is implicated here, however, given the express terms of §§ 552a(g)(1)(C)-(D) and (g)(4).

b. By comparison, where, as here, Congress *has* made an express waiver of immunity authorizing a monetary exaction, a court must construe that waiver in a way that makes a "realistic assessment of legislative intent" in light of the full text. *Irwin*, 498 U.S. at 95. Thus, the Court does not use the canon as "a mechanical rule of construction . . . to create doubts" about the meaning of statutory terms or to add to the "rigor" of the doctrine of sovereign immunity where an express waiver has been provided. *United States v. Rice*, 327 U.S. 742, 752-53 (1946); *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 383 (1949); *accord United States v. Williams*, 514 U.S. 527, 540 (1995) (Scalia, J., concurring).

c. For these reasons, this Court frequently has found the sovereign immunity canon to be unhelpful and inapplicable to the construction of statutes, like the Privacy Act, that (1) contain broad language authorizing suit against the United States and its agencies and (2) expressly subject the United States to liability for money damages using "customary" legal terms whose meaning is borrowed from common law tradition and statutes and precedents in existence at the time of enactment. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 222 (1945).

For example, in *Canadian Aviator*, 324 U.S. at 222, the Court declined to restrict an express waiver in the Public Vessels Act for "damages caused by a

public vessel" to those damages that were caused by a collision involving a public vessel, holding that "Congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation."

Similarly, in *American Stevedores v. Porello*, 330 U.S. 446, 450 (1947), the Court construed the same unqualified waiver of immunity for tort "damages" to reach *both* injury to property and individuals. *Id.* (noting that the "historical[]" meaning of "damages" was "a fact too well-known to have been overlooked by Congress").

And, in *Molzof*, the government argued that "the starting point for any discussion of the scope of federal liability under the FTCA must be a recognition that the statute is a limited waiver of the government's sovereign immunity" and that the waiver should be construed "strictly" and not "extended by implication." Brief for the United States 8 & n.3, *Molzof*, No. 90-838. However, the sovereign immunity canon played no role in the Court's construction of "punitive damages," and the Court rejected the government's position based on common law principles, judicial precedents, and legal dictionaries in existence when the FTCA was enacted. *Molzof*, 502 U.S. at 307.

Finally, in *Doe*, the government made the *exact same* argument that Petitioners are making here about the sovereign immunity canon and the Privacy Act. *Compare* Brief for the Respondent 17-25, *Doe v. Chao*, No. 02-1377 (2003), *with* Pet. Br. 13-19 (following the *Doe* brief almost verbatim). This Court ultimately agreed with the government that a claimant must submit evidence proving some "actual

damages" in order to obtain a monetary award. However, the Court did *not* embrace the sovereign immunity argument in any respect. To the contrary, the Court reviewed the Privacy Act in much the same way as it reviewed the FTCA in *Molzof* and the Public Vessels Act in *Porello* and *Canadian Aviator*—it engaged in a straightforward analysis of the statutory text, its apparent purpose, context, and relevant principles of tort law without reference to the canon. The same method should be followed in this case.

d. Even when the sovereign immunity canon is considered here, it is settled that the canon does not displace other principles and tools of statutory interpretation. As this Court explained in *Richlin*, 553 U.S. at 589-90, a case Petitioners ignore entirely, the sovereign immunity canon "is just that—a canon of construction. It is a tool for interpreting the law [that does not] displace[] the other traditional tools of statutory construction." Indeed, *Richlin* indicates the sovereign immunity canon should be invoked only as a last resort—after the Court has engaged in a close reading of the whole statute and employed other tools of construction to resolve any arguable ambiguities. *Id.*; *see also Ardestani v. INS*, 502 U.S. 129, 137 (1991) (relying on the canon as "reinforce[ment]" for the independent "conclusion that any ambiguities in the legislative history are insufficient to undercut the ordinary understanding of the statutory language"); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682, 685-86, (1983) (relying on the canon in tandem with "historic principles of fee-shifting in this and other countries" to define the scope of a fee-shifting statute); *Dep't of Energy v. Ohio*, 503 U.S. 607, 626-627 (1992) (resorting to the canon only after a close

reading of the statutory provision had left the Court "with an unanswered question and an unresolved tension between closely related statutory provisions"); *Smith*, 507 U.S. at 201-03 (invoking the canon only after observing that the claimant's argument was "undermine[d]" by the "commonsense meaning" of the statutory language).

Here, similar to *Richlin* and many other cases, "traditional tools of statutory construction . . . compel the conclusion" that "actual damages" is a synonym for "compensatory damages" that, in the context of a statute redressing statutory rights to privacy, includes compensation for proven mental or emotional distress. "There is no need for [this Court] to resort to the sovereign immunity canon [after a comprehensive analysis of the Act] because there is no ambiguity left [in the Act] to construe." *Richlin*, 553 U.S. at 590.

2. *Petitioners' Attempt To Limit "Actual Damages" To Pecuniary Losses Violates Settled Principles Of Statutory Construction*

Petitioners also declare that "actual damages" is an ambiguous term and further assume that the term's meaning in the Privacy Act cannot be grasped using traditional tools of statutory construction. Pet. Br. 19-22. In arriving at these summary determinations, they do not provide a meaningful analysis of legal dictionaries, treatises, statutes, or federal or common law precedents to support their position. Yet, a comprehensive construction of statutory text is precisely what this Court's decisions require. *E.g.*, *Richlin*, 553 U.S. at 590; *Molzof*, 502 U.S. at 307.

a. For example, Petitioners pass over the plain meaning of "actual damages" as evidenced by non-legal dictionaries and the legal meaning of "actual damages" as defined by legal dictionaries and treatises, precedents of this Court, and common law tradition. They also pass over the FTCA and the 1949 amendment to the FTCA, as well as the uniform construction of "actual damages" under section 812(c) of the 1968 Civil Rights Act and section 617 of the FCRA.

Petitioners assert that, at the time of the Privacy Act, it would have been (1) "'unprecedented' [for Congress to enact a statute that made] the United States liable for damages for mental or emotional distress" and (2) "highly unusual for Congress to subject the United States to liability for mental or emotional distress for the first time without expressly so providing . . . ." Pet. Br. 31. These contentions lack merit.

As previously noted, prior to the Privacy Act, Congress had made the government liable for damages for mental or emotional distress through § 2674's first paragraph and, pursuant to that paragraph, courts had held the government liable in tort for "actual damages" including proven mental or emotional distress. Furthermore, when Congress added § 2674's second paragraph and sought to limit government liability for "actual or compensatory damages" to pecuniary injuries in certain cases, it recognized a need to direct that result expressly in statutory text. And, in section 812(c) of the 1968 Civil Rights Act and section 617 of the FCRA, Congress proceeded to use the term "actual damages" without special qualifications or limitations and with a

judicially recognized intent to provide full compensation for *all* proven injuries caused by violations of statutory civil rights and privacy interests, including proven mental and emotional distress. *See* pp. 25-32 *supra*.

As a result, at the time of the Privacy Act, it manifestly was not "'unprecedented'" for Congress to enact a statute that made the government liable for damages for mental or emotional distress; nor was it "highly unusual" to provide compensation for proven mental or emotional distress through an award of "actual damages" plain and simple.

Indeed, since the Privacy Act, Congress has continued to enact statutes that subject the United States to liability for "actual damages" for certain derelictions of government duties. In those instances where Congress has sought to limit government liability for actual damages to pecuniary injuries, it has continued to recognize a need to direct that result expressly in statutory text. Conversely, in cases where Congress has legislated to protect the confidentiality and privacy of information in federal records, it has continued to provide for compensation for proven mental or emotional distress through an award of "actual damages" plain and simple.

For example, in the Internal Revenue Code, 26 U.S.C. §§ 7432-33, Congress has subjected the United States to liability for "actual damages" sustained by a taxpayer as a result of (1) a federal agent's failure to release a tax lien and (2) certain unauthorized tax collection actions. But, in each instance, Congress has specified that such damages must be "actual, direct economic damages" sustained by the taxpayer on account of the defendant's actions. *See also* 12

U.S.C. § 1821(e)(3)(A)-(B) (subjecting the FDIC in its capacity as a conservator or receiver of a depository institution to liability for actual damages caused by the disaffirmance or repudiation of certain contracts, but specifying that such damages must be "actual direct compensatory damages" and do not include "punitive or exemplary damages," "damages for lost profits or opportunity," or "damages for pain and suffering").

In contrast, since the Privacy Act, Congress has enacted at least one other privacy-protecting statute that is similar to the Privacy Act and subjects the United States to civil liability for "actual damages" without qualification for the unauthorized inspection or disclosure of federal tax returns or tax return information. *See* 26 U.S.C. § 7431(a) & (c). The federal district courts have held that this statute provides for federal liability for real and appreciable mental or emotional distress proven to have been caused by a violation of the statute's privacy requirements. *See Ward v. United States*, 973 F. Supp. 996, 1001-02 (D. Colo. 1997) (awarding "actual damages" for proven mental and emotional distress); *Hrubec v. Nat'l R.R. Passenger Corp.*, 829 F. Supp. 1502, 1504-06 (N.D. Ill. 1993) (finding the statute "includes damages for emotional distress" and denying motion to strike or dismiss emotional distress claims); *see also Jones v. United States*, 9 F. Supp. 2d 1119, 1148-51 (D. Neb. 1988) (following the reasoning of *Ward* and *Hrubec* and entering awards for "actual damages" reflecting both pecuniary and nonpecuniary injuries proven at trial).

These later-enacted statutes reinforce and confirm that there is nothing unprecedented or

unusual about the Privacy Act's "actual damages" provision. The Privacy Act does not contain any express provision akin to the 1949 amendment to the FTCA or 26 U.S.C §§ 7432-33 directing that "actual damages" be measured in terms of economic or pecuniary injuries. To the contrary, the Act is like the 1968 Civil Rights Act, the FCRA, and 26 U.S.C § 7431(a) & (c): it authorizes compensation for "actual damages" plain and simple and without any other qualification.

b. Petitioners cite only two statutes as being relevant to the construction of "actual damages." Neither involves the liability of the government for monetary exactions or redress for violations of privacy or other statutory civil rights, and both include statute-specific definitions or provisions directing that compensation be measured in strictly economic terms. 17 U.S.C. § 1009(d)(l)(ii) and 18 U.S.C. § 2318(e)(3)(B). Far from supporting Petitioners, these statutes reinforce the point that Congress historically has used the term "actual damages" without qualification as a synonym for "compensatory damages" and has supplied an express limitation when it intends to limit liability for "actual damages" to economic injuries.

c. Petitioners also miss the mark when they cite *Birdsall*, 93 U.S. at 64-71, and *Connecticut Railway & Lighting Co. v. Palmer*, 305 U.S. 493, 494, 504 (1939), as being supportive of their position. As previously noted, *Birdsall* defines "actual damages" as a synonym for "compensatory damages," and *Palmer* is not to the contrary. In each case, the Court naturally discussed "actual damages" in terms of economic injury because economic injuries were the

only types of injury at issue. Neither casts doubt on the common meaning of "actual damages" as a synonym for "compensatory damages" authorizing compensation for real and substantial mental or emotional distress sustained by an individual as a result of a federal agency's intentional or willful violation of a privacy statute.[5]

d. Petitioners note that the Privacy Protection Study Commission (PPSC) and courts of appeals on both sides of this "actual damages" question have considered the term to be ambiguous at least to some degree when viewed in isolation and without the aid of traditional tools of construction. Pet. Br. 20-22. But the Fifth and Ninth Circuits had no difficulty grasping the meaning of "actual damages" when read in context and with the aid of traditional tools of construction. Pet. App. 22a-36a; *Johnson v. IRS*, 700 F.2d 971, 974-86 (5th Cir. 1983). And their decisions align well with the method of analysis employed by this Court in *Richlin*, *Molzof*, *Porello*, and *Canadian Aviator*.

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[5] This is not to say every federal statute that provides for "actual damages" must be construed to provide for compensation for mental and emotional distress. As a synonym for compensatory damages, "actual damages" provides compensation for proven injuries that are legally cognizable—*i.e.*, those types of injuries that are the natural and primary consequence of a violation of a particular legal right or interest. *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 223-24 (1996); *Carey v. Piphus*, 435 U.S. 247, 254-59 (1978). In some instances, that might be a purely economic interest. But, in 1974, it was clear that compensation for the natural, primary, and legally cognizable consequences of an invasion of privacy and a violation of federal civil rights included proven mental or emotional distress.

In contrast, the views expressed by the Sixth and Eleventh Circuits and the PPSC suffer from the same flaws as the Petitioners' brief—*i.e.*, they do not account for the term's plain meaning, its definitions in legal dictionaries, common law tradition, or other tools of statutory construction.

The Eleventh Circuit's decision on this question consists of a single paragraph asserting that "actual damages" has no plain meaning, followed by a two-page analysis of legislative history that has been described as patently flawed by multiple courts. *Fitzpatrick v. IRS*, 665 F.2d 327, 329-31 (11th Cir. 1982); *e.g.*, *Johnson*, 700 F.2d at 981 nn. 25, 27. The Sixth Circuit's decision is no broader: it consists of eight sentences—five following *Fitzpatrick* and three noting disapproval of the Fifth Circuit's decision in *Johnson* based upon the sovereign immunity canon. *Hudson v. Reno*, 130 F.3d 1193, 1207 & n.11 (6th Cir. 1997). The PPSC's post-enactment statement of its views on this issue also was cursory—consisting of only one page of commentary in a 620-page report with no citation to *any* legal authority or legislative history. *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* 529-31 (1977).

3. Petitioners' Assertion That The Privacy Act's "Actual Damages" Provision Was Modeled On Defamation "Per Quod" Is Erroneous

All parties agree that Congress drew upon the common law torts of defamation and invasion of privacy when drafting and enacting the Privacy Act's civil liability provision. Petitioners, however, go a

step farther and assert that the Act's "actual damages" provision was modeled *specifically* on the torts of libel and slander "per quod"—two common law defamation torts that required a claimant to plead and prove "special damages" consisting of pecuniary losses as a prerequisite to any monetary award. And from this premise, Petitioners leap to the conclusion that it is only "natural" to construe "actual damages" to include only pecuniary loss. Pet. Br. 22-24. There is, however, no factual or legal support for the premise that the Act's "actual damages" provision was modeled on the requirements of libel or slander per quod.

a. To begin with, Petitioners overreach by relying on *dicta* from *Doe*. Pet. Br. 22-24. *Doe* turned on "a straightforward textual analysis" of §§ 552a(g)(1) and (4) and the "traditional understanding that tort recovery" requires "proof of some harm for which damages can reasonably be assessed." 540 U.S. at 620-21, 628 n.12. This Court did *not* state, as matter of fact, that the Privacy Act's "actual damages" provision was modeled on libel or slander per quod or hold, as a matter of law, that the term should be construed as such. To the contrary, the Court reserved judgment on whether "adequately demonstrated mental anxiety" would constitute proof of "actual damages" for purposes of civil liability under the Act. *Id.* *Doe* accordingly does not support Petitioners.

b. The text of the Act itself likewise does not support Petitioners' contentions concerning libel or slander per quod. The Act does not refer to either "special harm" or "special damages" (the specific terms of art used in actions in libel and slander per

se and per quod to denote pecuniary loss and compensation for pecuniary loss). *See, e.g.*, *Webster's Third New International Dictionary* 2186 (defining "special damages"); Dobbs, *Handbook on the Law of Remedies*, § 7.2 at 512-13, 520-22 (discussing "special damages" in libel and slander per se and per quod); Restatement (First) of Torts § 575 cmt. b ("*Special harm* as the words are used in this Chapter, is the loss of something having economic or pecuniary value."); Restatement (Second) of Torts § 575 cmt. c (same).

To the contrary, the Act employs a *different* term that had a *different* legal definition at the time of the Act's enactment—a term, moreover, that recently had been (1) used in other legislation providing redress for violations of federal civil rights and statutes regulating the maintenance and use of personal records and (2) construed to encompass proven mental or emotional distress. And the Act contains a broadly phrased statutory statement of purpose that is inconsistent with a reading of "actual damages" as a synonym for special damages under libel or slander per quod.

c. The Act's legislative history also belies Petitioners' argument concerning libel and slander per quod. Petitioners claim that a single remark by Representative Eckhardt directly addressed the meaning of "actual damages." Pet. Br. 25. They are mistaken. During a debate on a proposed amendment to the House bill that would have made the government liable for "innocent" violations of the Act, Representative Eckhardt provided a hypothetical example of an innocent violation of the Act involving only economic injury (lost wages following the loss of

employment). *See* 120 Cong. Rec. 36,955-56 (1974). In the context of that hypothetical, Representative Eckhardt stated that there is nothing in this [*i.e.*, the proposed amendment] that would provide for any damages beyond the [the plaintiff's] actual out-of-pocket expenses." *Id.* In short, the remark is not a comment on the meaning of "actual damages" but a simple conclusion to a hypothetical about a pecuniary injury.

In reality, no member of Congress made any remark indicating that the Act's "actual damages" provision was limited to pecuniary losses or modeled on the torts of libel or slander per quod. Nor did any member indicate that he understood "actual damages" to be synonymous with the concept of "special damages" under the law of defamation. To the contrary, as introduced, H.R. 16,373 and S. 3418 used the term "actual damages" in its ordinary sense as a synonym for "compensatory damages" and as distinguished from "punitive" and "liquidated" damages. *See* pp. 35-41 *supra*.

d. Petitioners note that, in the final version of the Act, Congress did not include language appearing in a late amendment to S. 3418 that would have authorized both "actual" and "general" damages for "any" violation of the Act by a government officer or employee. From this observation, Petitioners contend that (1) "general damages" is a term that Congress would have understood to include monetary awards for "proven, as well as presumed," mental or emotional distress and (2) Congress's election not to enact a "general damages" remedy is a signal that it intended to exclude claims not only for presumed mental or emotional distress but also proven mental

or emotional distress. Pet. Br. 25-28. There are several problems with Petitioners' position.

To start, that was *not* the government's position in *Doe*. *See* Brief for the Respondent 42-43, *Doe*, No. 02-1377. In *Doe*, the government maintained that (1) "[t]he 'general damages' provision likely derived from the common law tort of invasion of privacy, where 'general damages' may be awarded as 'presumed damages' without proof of harm" and (2) the final version of the Act "eliminated the authorization for general or 'presumed' damages." *Id.* The government was on the mark in *Doe*: the omission of general damages from the final legislation was intended to preclude an award of presumed damages without proof of injury. It reveals nothing about compensation for proven mental or emotional distress.

In any event, the circumstances surrounding the amendment to S. 3418 do not support Petitioners' position. The legislative history shows that on the day that the Senate passed its version of the Privacy Act, Senator Ervin placed a memorandum in the legislative record calling for "a provision for liquidated damages of say $1,000." 120 Cong. Rec. at 36,891 (Sen. Ervin). The next day, the Senate authorized a "correction[]" to both the House and Senate bills adding a provision for "actual and general damages sustained by any person but in no case shall a person entitled to recovery receive less than the sum of $1,000." *See* H.R. 16,373, § 303(c)(1) (Nov. 22, 1974) (as passed by the Senate); *see also* 120 Cong. Rec. at 37,085 (Sen. Byrd) (proposing the correction to engrossed Senate bill, S. 3418). No one addressed the meaning of the "general damages"

amendment or how general damages might be distinguished from actual damages, liquidated damages, or punitive damages—the only other damages measures considered in connection with the Act.

In the Act's final version, Congress did direct the PPSC to study whether the United States should be made liable for "general damages," but this reference to the PPSC also was not defined or explained. *Doe*, 540 U.S. at 639 n.6 (Ginsburg, J., dissenting) (describing the reference as "less than crystalline").

All of this drafting history was carefully presented to the Court in *Doe*, and the Court concluded that "[t]he deletion of general damages from the bill is fairly seen, then, as a deliberate elimination of any possibility of imputing harm and awarding presumed damages." *Id.* at 623. There is no reason to draw a different conclusion now.

4. Petitioners' Limiting Construction Of "Actual Damages" Is Not Supported By Public Policy

Petitioners lastly offer three policy-based arguments in pursuit of their effort to redraft the statute and alter its intended meaning. Pet. Br. 32-35. But these arguments cannot, in keeping with sound principles of statutory construction, be used to narrow the meaning of the words chosen by Congress. Moreover, they are unpersuasive even if considered.

a. As noted above, the principles of statutory construction are applied to the language of a statute, read in context, to properly determine the intent of Congress. Abstract policy arguments untethered

from that language cannot be invoked to alter a statute's meaning as enacted. "The principle of our democratic system is not that each legislature enacts a purpose, *independent of the language in a statute*, which the courts must then perpetuate . . . ." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part and dissenting in part) (emphasis added) (adhering to the text of § 526(a) of the Tariff Act of 1930, read in context and with the aid of traditional tools of interpretation; disagreeing with a narrower construction of the statute based on policy arguments untethered from the text).

b. In the first of their policy diversions, Petitioners express a generalized fear for depletion of the federal fisc if individuals are allowed to assert claims based on proven mental or emotional distress. Pet. Br. 32-33. This argument was succinctly answered in the dissents of Justices Ginsburg and Breyer in *Doe*, which note how settled judicial constructions of other provisions of the Act make the risk of frequent or "massive recoveries" from the fisc highly unlikely. 540 U.S. at 636 (Ginsburg, J. dissenting); *id.*, at 641-42 (Breyer, J. dissenting). There is much force to this observation in view of the Act's requirements that an "intentional" or "willful" violation be proven as a prerequisite to any compensation for injuries.[6]

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[6] Apart from the elevated standard of culpability, the Act contains numerous exceptions providing for the disclosure of otherwise confidential information (*e.g.*, 5 U.S.C. §§ 552a(b)(1)-(12)) as well as other substantive provisions that effectively limit the possibility of claims under §§ 552a(g)(1)(C)-(D). As a practical matter, claims for compensation for proven injuries ultimately can be brought under §§ 552a(g)(1)(C)-(D) only in a

Continued on following page

Indeed, in *Doe*, the government was forced to concede at oral argument that there has not been "'a problem with enormous recoveries against the government up to this point.'" *Id.* at 636 (Ginsburg, J. dissenting) (quoting the oral argument transcript). Experience with the Privacy Act in the Fifth Circuit over the last twenty-eight years does not suggest that there will be a drain on the fisc if individuals are allowed to assert claims based on proven mental or emotional distress.

c. Next, Petitioners contend that claims for emotional distress should be excluded from the Act's scope because they are inherently subjective and thus "problematic" for the government even when decided (as they are in Privacy Act cases) by a federal judge. Pet. Br. 33-34. This argument lacks merit as well. More than three decades of experience under the Privacy Act has shown that federal judges understand that the Act does not "endorse massive recoveries" against the government. *Doe*, 540 U.S. at 636 (Ginsburg, J. dissenting). Again, experience shows that federal courts require competent proof of real and substantial injury and do not award substantial (or even nominal) amounts for mere hurt feelings. *See Hitt v. Connell*, 301 F.3d 240, 250-51 (5th Cir. 2002) (reviewing the sufficiency of evidence of mental and emotional distress in a § 1983 action).

d. Petitioners finally contend that claims for emotional distress should be excluded from the Act's scope because the Act contemplates proceedings for

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Continued from previous page
narrow range of situations created by egregious agency misconduct, and, even then, recovery is far from certain.

injunctive relief and criminal penalties for certain violations. This is more misdirection. Neither involves individual compensation for injuries resulting from an intentional or willful violation of the Act. Congress enacted the Act's civil liability provision to provide compensatory relief. The Act's language and structure provide no indication, moreover, that the injunctive or criminal penalty provisions serve to narrow the compensatory relief authorized by Congress in any respect.

CONCLUSION

Congress plainly provided Mr. Cooper with a civil remedy against Petitioners for his injuries. He should be allowed to proceed to trial where his claim may be developed and adjudicated. The judgment of the court of appeals should be affirmed.

Respectfully submitted.

RAYMOND A. CARDOZO
Counsel of Record
JAMES M. WOOD
JAMES C. MARTIN
DAVID J. BIRD
TIFFANY RENEE THOMAS
THOMAS M. POHL
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
(415) 543-8700
rcardozo@reedsmith.com

September 27, 2011 *Attorneys for Respondent*

REPLY BRIEF

No. 10-1024

In the Supreme Court of the United States

FEDERAL AVIATION ADMINISTRATION, ET AL.,
PETITIONERS

v.

STANMORE CAWTHON COOPER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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In the Supreme Court of the United States

No. 10-1024

FEDERAL AVIATION ADMINISTRATION, ET AL.,
PETITIONERS

v.

STANMORE CAWTHON COOPER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Contradicting the conclusions of the Privacy Protection Study Commission and every court of appeals that has addressed the question presented, respondent contends (Br. 8) that the term "actual damages" has an accepted "plain meaning" that "clearly encompasses compensation for proven mental or emotional distress." That contention is unsupportable. The term has no such plain meaning as a general matter: even respondent ultimately acknowledges (Br. 50 n.5) that "actual damages" in a federal statute can sometimes refer exclusively to pecuniary harm. The term also has no such plain meaning at common law: not only could common-law "actual damages" refer to purely pecuniary harm, but that would be the most natural interpretation in a context, like the Privacy Act, where the term is distinguished from "general damages." And the term has no such plain meaning in the Privacy Act: to the extent that

respondent tries to derive one from unrelated statutes, other parts of the Privacy Act, and the asserted purpose of the Act, he essentially repeats the errors of the court of appeals.

The untenability of respondent's "plain meaning" argument is fatal to his position. As the court of appeals correctly recognized, if "actual damages" is "susceptible of two plausible interpretations, then the sovereign immunity canon requires [a] court to construe the term narrowly in favor of the Government, holding that nonpecuniary damages are not covered." Pet. App. 34a. Respondent briefly contends that the sovereign-immunity canon is inapplicable here, but his contention is at odds with well-settled law and largely presupposes the correctness of his plain-meaning argument.

In any event, as the government's opening brief demonstrates, interpreting "actual damages" in the Privacy Act to exclude awards for mental and emotional distress is not only a "plausible" construction, but the best construction. As both this Court and the Privacy Protection Study Commission have recognized, the Privacy Act's requirement of "actual damages" as a prerequisite to recovery mirrors the common-law remedial scheme for defamation per quod, in which recovery was available only upon proof of economic loss. Gov't Br. 22-25. And respondent offers no meaningful answer to the demonstration in the government's opening brief that damages for mental or emotional distress would fall within the common-law definition of "general damages"—a type of damages that Congress expressly declined to authorize in the Privacy Act. *Id.* at 25-29.

I. THE SOVEREIGN-IMMUNITY CANON REQUIRES THAT "ACTUAL DAMAGES" BE GIVEN ITS NARROWER INTERPRETATION AS INCLUDING ONLY PECUNIARY HARM

There is no dispute that the civil-remedies provision of the Privacy Act is a waiver of the United States' sovereign immunity. Accordingly, under the longstanding strict-construction canon for such waivers, a "plausible" interpretation favoring the government "is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992)). Respondent's attempts to avoid application of that principle in this case are unavailing.

A. Respondent first asserts that once "Congress has made an express waiver of immunity authorizing a monetary exaction," the strict-construction canon plays no role in interpreting the extent of the monetary exaction Congress has authorized. Br. 42 (emphasis omitted). That assertion cannot be reconciled with this Court's repeated recognition that the strict-construction rule applies not only in determining the existence of a waiver, but also in determining its "scope." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *Lane* v. *Peña*, 518 U.S. 187, 192 (1996); see also, *e.g.*, *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981). As cases cited in the government's opening brief (at 16-18) demonstrate, even when a statute unambiguously permits some monetary recovery from the government, the question whether that statute authorizes a particular monetary remedy is a separate question of "scope" as to which the sovereign-immunity canon applies with full force. Indeed, respondent himself favorably cites a case, *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986) (cited at Resp. Br. 42), in which the Court applied the canon to conclude that a civil-rights statute authorizing damages liabil-

ity against the United States did not authorize an award of prejudgment interest. *Id.* at 319.

Additional cases cited by respondent do not establish a contrary rule. Many of those cases concern the waiver of sovereign immunity in the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* See Resp. Br. 33, 42-43 (citing *Smith* v. *United States*, 507 U.S. 197 (1993); *Molzof* v. *United States*, 502 U.S. 301 (1992); *Rayonier Inc.* v. *United States*, 352 U.S. 315, 319-320 (1957); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68-69 (1955); *United States* v. *Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949)). The Court has recognized that the FTCA contains particularly "sweeping language," reflecting Congress's "clear intent," and has emphasized that cases construing the FTCA "do not * * * eradicate the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." *Nordic Village*, 503 U.S. at 34 (internal quotation marks and citations omitted).

Other cases cited by respondent involve a particular rule that statutes of limitations in actions against the government are generally subject to equitable tolling. See Br. 33, 42 (citing *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990); *Bowen* v. *City of New York*, 476 U.S. 467 (1986)). Those cases do not control application of the strict-construction rule in other contexts—in particular, where, as in this case, the availability of a monetary remedy is at issue. See, *e.g.*, *Lane*, 518 U.S. at 192 (applying canon to deny a damages remedy and citing *Irwin* favorably); *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991) (applying canon to deny attorney's fees and distinguishing *Irwin*). Monetary-exaction cases like this one lie at the core of the separation-of-powers concerns animating the sovereign-immunity canon, and disregarding the canon in such cases

would create an unacceptable risk of usurping Congress's exclusive authority over the Treasury. Gov't Br. 15-16.

Respondent suggests (Br. 43-44) that even though a monetary exaction is at issue in this case, the Court's decision in *Doe* v. *Chao*, 540 U.S. 614 (2004), must be read as rejecting the applicability of the sovereign-immunity canon to the Privacy Act's civil-remedies provision. *Doe*, however, said nothing about abandoning the sovereign-immunity canon in the context of the Privacy Act, nor did it give any reason why such a special exception from the Court's sovereign-immunity precedents would be appropriate. Cf. *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137 (2008) ("Courts do not normally overturn a long line of earlier cases without mentioning the matter."). Rather, the Court had no need to address the sovereign-immunity canon in *Doe*, because it was adopting the government's narrowing construction of the Act. 540 U.S. at 616-627.

B. Respondent's remaining objection to applying the sovereign-immunity canon in this case rests on a mischaracterization of the government's position. The government, he asserts, is "urg[ing] that the sovereign immunity canon displace other tools of construction." Resp. Br. 41. That is not the government's argument. The government does not dispute that the sovereign-immunity canon would be immaterial if, as in cases cited by respondent, statutory-construction rules aside from the canon itself were to demonstrate that the government's interpretation of "actual damages" is without a reasonable basis. See *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 590 (2008) (declining to find sovereign-immunity argument dispositive when there was no "ambiguity left for us to construe") (cited at Resp. Br. 44); *United States* v. *Rice*, 327 U.S. 742, 753 (1946) (declining to find sovereign-immunity argument dispositive when it sought to "create doubts" in "[s]tatutory language and

objective" that otherwise exhibited "reasonable clarity") (cited at Resp. Br. 42); *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 222-224 (1945) (declining to find sovereign-immunity argument dispositive when text and congressional intent were sufficiently clear) (cited at Resp. Br. 42); cf. *Molzof*, 502 U.S. at 306 (concluding that language was clear without expressly mentioning sovereign-immunity canon) (cited at Resp. Br. 43); *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 450 (1947) (same) (cited at Resp. Br. 43).

The government does, however, dispute that respondent has made, or could make, such a demonstration. See Part II, *infra*. Respondent's contention that the sovereign-immunity canon is "unhelpful" in cases where, *inter alia*, the relevant statute "expressly subject[s] the United States to liability for money damages using 'customary' legal terms whose meaning is borrowed from common law tradition and statutes and precedents in existence at the time of enactment" (Br. 42), simply begs the question whether such an "express[]" waiver is present in this case. So long as the Court agrees with the government that it is at least "plausible" to construe "actual damages" as limited to pecuniary harm, then the sovereign-immunity canon compels the adoption of that construction. *Nordic Village*, 503 U.S. at 37.

II. THE PRIVACY ACT DOES NOT PERMIT CLAIMS FOR MENTAL OR EMOTIONAL DISTRESS

The government demonstrates in its opening brief that the term "actual damages" in the Privacy Act is not only plausibly, but most reasonably, understood as limited to pecuniary harm. Gov't Br. 21-35. In answering that argument, respondent advances (Br. 8) the novel contention that the "plain" legal meaning of "actual damages" neces-

sarily encompasses awards for mental and emotional distress. Regardless of the level of generality at which respondent frames it, that argument is unsound.

A. At certain points, respondent appears to suggest that the term "actual damages," no matter the context, always includes awards for mental and emotional distress. See, *e.g.*, Br. 28 (suggesting that Congress must provide a clear textual statement when it intends to exclude such awards). That contention is untenable. The Privacy Protection Study Commission—the expert body Congress established in the Privacy Act and charged with studying the Act's damages provision—along with every court of appeals to have addressed the question presented has found that the term "actual damages" can refer exclusively to pecuniary harm. Gov't Br. 20-21. That uniform conclusion accurately reflects usage of the term by a number of authorities before and around the time of the Privacy Act's enactment.[1]

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[1] In addition to the authorities cited in note 2, *infra*, which use "actual damage(s)" as a synonym for "special damage(s)," see, *e.g.*, *Guzman* v. *Western State Bank*, 540 F.2d 948, 953 (8th Cir. 1976) (using "actual damages" to mean "out-of-the-pocket pecuniary loss," as distinct from "emotional and mental distress"); *Morvant* v. *Lumbermens Mut. Cas. Co.*, 429 F.2d 495, 496 (5th Cir. 1970) (using "actual damages" to refer to medical expenses and lost wages, as distinct from "pain and suffering"); *Waples-Platter Cos.* v. *General Foods Corp.*, 439 F. Supp. 551, 582-583 (N.D. Tex. 1977) (using "actual damage" to mean "economic damage"); *Beik* v. *Thorsen*, 363 A.2d 1030, 1031 (Conn. 1975) (per curiam) (using "actual damage" to mean "pecuniary loss") (quoting Am. Jur. treatise); *Daniels* v. *Coleman*, 169 S.E.2d 593, 597-598 (S.C. 1969) (same); *Reist* v. *Manwiller*, 332 A.2d 518, 520 n.4 (Pa. Super. Ct. 1974) (using "actual damages" as distinct from "emotional distress" and "mental suffering"); *Nalder* v. *Crest Corp.*, 472 P.2d 310, 315 (Idaho 1970) (using "actual damages" as generally distinct from "damages for mental anguish"); *Peine* v. *Murphy*, 377 P.2d 708, 712 (Haw. 1962) (using "actual damages" to mean "pecuniary loss"); see also Gov't Br. 20 (citing statutory-construction decisions of this Court).

In fact, respondent ultimately concedes the point. In a footnote towards the end of his brief (Br. 50 n.5), he disavows the position that "every federal statute that provides for 'actual damages' must be construed to provide for compensation for mental and emotional distress." Accordingly, even in respondent's view, the mere appearance of the term "actual damages" in the text of a statute is not by itself sufficient to establish that Congress intended—let alone clearly and unequivocally intended—to authorize awards for mental and emotional distress.

B. As an apparent alternative to the more categorical argument, respondent contends that the term "actual damages" in the Privacy Act encompasses awards for mental and emotional distress because such awards were available at common law for "invasion of privacy and defamation by libel and slander per se." Br. 9; see Br. 21-25, 50 n.5. That contention is misplaced. This Court has already observed that the remedial scheme in the Privacy Act differs from the remedial scheme for defamation per se (which awarded automatic damages for certain types of defamatory statements). *Doe*, 540 U.S. at 625; see, *e.g.*, Dan B. Dobbs, *Handbook on the Law of Remedies* § 7.2, at 510-513 (1st ed. 1973) (Dobbs). And whatever role the common-law invasion-of-privacy tort may have played in the development of the Privacy Act, it did not provide the model for the Act's civil-remedies provision.

Under the common law at the time the Privacy Act was enacted, a plaintiff asserting a claim for "certain dignitary invasions, such as libels [and] invasions of privacy," could obtain an award of "general damages" for "the affront to [his] dignity and the emotional harm done." Dobbs § 3.2, at 139; see also, *e.g.*, William L. Prosser, *Handbook of the Law of Torts* § 112, at 761 (4th ed. 1971) (Prosser) (observing that certain defamation plaintiffs could recover "'general'

damages" for "wounded feelings or humiliation") (footnote omitted). Such an award is not, however, available under the Privacy Act. Instead, the Act "indicates beyond serious doubt that general damages are not authorized," because a provision for "general damages" was deleted from the bill and the Act instead directed the Privacy Protection Study Commission to study whether the civil-remedies provision should be amended to include "general damages." *Doe*, 540 U.S. at 622-623; see Privacy Act § 5(c)(2)(B)(iii), 88 Stat. 1907 (assigning Commission to study "whether the Federal Government should be liable for general damages incurred by an individual as the result of a willful or intentional violation of" 5 U.S.C. 552a(g)(1)(C) or (D)). That express textual directive forecloses respondent's argument that "actual damages" in the Privacy Act include the sort of "general damages for outrage to feelings and loss of reputation" that were recoverable in a common-law action for defamation per se or invasion of privacy. Br. 22-23 (quoting *Childers* v. *San Jose Mercury Printing & Pub. Co.*, 38 P. 903, 904 (Cal. 1894)).

Respondent briefly asserts (Br. 54-56) that the Act's exclusion of "general damages" precludes awards for mental or emotional distress only when such distress is presumed, and not when such distress is proven. He relies on statements from the government's *Doe* brief and this Court's *Doe* decision recognizing that "general damages" can be presumed without proof. Resp. Br. 55-56. But those statements do not address, and certainly do not refute, the full common-law definition of "general damages" as a particular *type* of damages (here, including awards for mental or emotional distress) that could *either* be presumed (in the absence of evidence) *or* be proven (if evidence was available). Gov't Br. 26-27; see, *e.g.*, Restatement of Torts § 904 & cmt. a (1939) (First Restatement); see Restatement (Sec-

ond) of Torts § 904 & cmt. a (1977) (similar) (Second Restatement); Dobbs § 3.2, at 139; Prosser § 112, at 761. That common-law background, which respondent does not meaningfully dispute, should be controlling. As respondent recognizes, it is a "'cardinal rule' of statutory construction" that Congress "presumably knows and adopts" the well-known common-law definitions of terms that it uses. Br. 18 (quoting *Molzof*, 502 U.S. at 307).

Contrasted with the "general damages" that the Act precludes, the "actual damages" that the Act permits are best understood as limited solely to recovery for pecuniary harm. In the defamation and invasion-of-privacy context, the only other potential types of damages, aside from "general damages," were "proof of actual economic harm and * * * punitive damages." Dobbs § 3.2, at 139. There is no dispute that the Act precludes punitive damages, so once "general damages" are eliminated, the only remaining category of damages that the Act could allow is recovery for actual economic loss.

Tellingly, that is exactly how the Privacy Protection Study Commission understood the Act's "actual damages" provision. It recognized that the "general damages" Congress had declined to authorize would have included awards for mental and emotional distress. *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* 530 (1977) (*Privacy Commission Report*). And it contrasted those "general damages" with the "actual damages" that Congress had in fact authorized. *Ibid.* "[W]ithin the context of the Act," the Commission concluded, the term "actual damages" was "intended as a synonym for special damages as that term is used in defamation cases," which were limited to damages for "loss of * * * tangible pecuniary benefits." *Ibid.*

This Court has likewise recognized that the Act's civil-remedies provision "parallels" the common-law remedial scheme for defamation per quod, in which, because the alleged defamation fell outside the categories of statements deemed harmful per se, proof of pecuniary harm was a necessary prerequisite for recovery. *Doe*, 540 U.S. at 625-626; see Gov't Br. 22-25; First Restatement §§ 575 & cmts. a-c, 623 cmt. a; Second Restatement §§ 575 & cmts. a-c, 623 cmt. a; Dobbs, § 7.2, at 511-512, 520. Contrary to respondent's suggestion (Br. 20 n.2, 52-53), courts, legislatures, and treatises referring to such purely pecuniary losses in the defamation per quod context sometimes used the term "actual damages" (or "actual damage") in place of the term "special damages" (or "special damage").[2] And Congress

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[2] See, *e.g.*, *Wetzel* v. *Gulf Oil Corp.*, 455 F.2d 857, 862 (9th Cir. 1972) (defining "libel *per quod*" as requiring "valid and sufficient evidence of actual damage"); *Electric Furnace Corp.* v. *Deering Milliken Research Corp.*, 325 F.2d 761, 765 (6th Cir. 1963) (defining "libel per quod" as requiring "proof of actual damages, proximately caused by the libel"); *Hardboard Mach. Co.* v. *Coastal Prods. Co.*, 289 F. Supp. 496, 498 (M.D. Ga. 1967) (defining "per quod actions" for libel as requiring a plaintiff "to show that the language used did produce actual damage") (quoting 33 Am. Jur. *Libel & Slander* § 5, at 41 (1941)); *Glenn* v. *Gidel*, 496 S.W. 2d 692, 697 (Tex. Civ. App. 1973) (defining slander "actionable per quod" as "actionable only in view of actual damages resulting from slanderous words"); *Standifer* v. *Val Gene Mgmt. Servs., Inc.*, 527 P.2d 28, 30-31 (Okla. Ct. App. 1974) (defining slander "per quod" based on statutory requirement of "actual damage") (citing Okla. Stat. tit. 12, § 1442); *M&S Furniture Sales Co.* v. *Edward J. DeBartolo Corp.*, 241 A.2d 126, 128 (Md. 1968) (defining defamation per quod as requiring a showing that the "words or [expressive] conduct caused actual damage"); Prosser § 112, at 754 (explaining that "slander, in general, is not actionable unless actual damage is proved"); cf. George E. Frasier, Note, *An Alternative to the General-Damage Award for Defamation*, 20 Stan. L. Rev. 504, 512 n.28 (1968) (explaining that state statutes have used the term "actual damages" to mean "special damages").

used the term "actual damages" in that way in the civil-remedies provision of the Privacy Act.

The Privacy Act's unprecedented substantive scope gave Congress good reason to be cautious about expanding the government's damages liability any further. Many potential Privacy Act violations that could result in damages suits had no substantive analogue in the common-law torts respondent identifies (or any other common-law tort). The Act would potentially allow a damages suit alleging, for example, that a government agency intentionally or willfully maintained more information than necessary about someone, see 5 U.S.C. 552a(e)(1); improperly collected material information about someone from third parties rather than the person himself, see 5 U.S.C. 552a(e)(2); or failed to provide timely notice in the Federal Register of a new routine use for someone's records, see 5 U.S.C. 552a(e)(11). 5 U.S.C. 552a(g)(1)(D) and (4). None of those administrative activities would have been actionable at common law. Even the Privacy Act's disclosure-related provision sweeps much more broadly than the common law: the very subject of respondent's claim in this case—the interagency information-sharing in Operation Safe Pilot—would not, for example, have constituted common-law invasion of privacy. Compare, *e.g.*, Second Restatement § 652D & cmt. a (no invasion of privacy unless there is communication to the public), with 5 U.S.C. 552a(b) (forbidding disclosure to "any person" unless authorized by the Act).

The adverse consequences of extending broad common-law remedial schemes, including awards for mental and emotional distress, to *sui generis* suits against the United States under the Privacy Act were potentially quite serious when the Act was passed (and remain so today). Congress therefore proceeded guardedly, "restrict[ing] recovery to specific pecuniary losses until the Commission could weigh

the propriety of extending the standard of recovery." *Privacy Commission Report* 530. And after receiving the Commission's report, Congress ultimately left the Act where it originally stood: without a provision for mental-distress or emotional-distress awards.

C. As another alternative to the more categorical plain-meaning argument, respondent asserts (Br. 50 n.5) that the term "actual damages" necessarily includes awards for mental and emotional distress whenever the term is used in the context of "a violation of federal civil rights." This appears to be a reference to his contention (Br. 25-32) that the construction of "actual damages" in the Privacy Act should track the construction that some lower courts have given to "actual damages" in the context of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* (FCRA), and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.* (Fair Housing Act or FHA). Respondent's effort to analogize the Privacy Act to these textually and contextually dissimilar statutes is unavailing.

The government's opening brief explains why a single district court's construction of FCRA's materially different civil-remedies provision, in a private tort dispute decided after the term "actual damages" had already been introduced into drafts of the Privacy Act, has no relevance to this case. Gov't Br. 41-42. And even the Ninth Circuit considered the FHA, which "broadly prohibits discrimination in housing throughout the Nation," *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 93 (1979), to be insufficiently "analogous in time, purpose, and subject matter" to allow for a legitimate comparison to the Privacy Act. Pet. App. 32a n.2. Moreover, as was the case with the Tax Reform Act cited by the petitioner in *Doe*, the FHA's text is "too far different from the language of the Privacy Act to serve as any sound basis for analogy." *Doe*, 540 U.S. at 626.

Among other things, the FHA's civil-remedies provision was not a waiver of the United States' sovereign immunity (as the Privacy Act's is), and the FHA did not expressly preclude recovery for "general damages" (as the Privacy Act does). Compare Fair Housing Act, Pub. L. No. 90-284, Title VIII, § 812(c), 82 Stat. 88, with Privacy Act of 1974, Pub. L. No. 93-579, §§ 3, 5(c)(2)(B)(iii), 88 Stat. 1901, 1907.[4]

D. Respondent also repeatedly attempts to compare the Privacy Act to the FTCA. The comparison is inapt. The primary liability provision under the FTCA does not use the term "actual damages." It instead provides that the United States "shall be liable" for certain tort claims "in the same manner and to the same extent as a private individual" under relevant state law, subject to the proviso that prejudgment interest and punitive damages are not recoverable. 28 U.S.C. 2674. That language is much more expansive than the Privacy Act's waiver for "actual damages." See, *e.g.*, *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547 (1951) ("The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language."); see also p. 4, *supra*. Respondent's observation (*e.g.*, Br. 27) that the

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[4] Similar defects undermine the claim of one of respondent's amici that "[m]any privacy statutes contain damages provisions similar to the Privacy Act, and courts routinely interpret those provisions as including mental and emotional distress." EPIC Amicus Br. 6. The amicus makes little effort to compare the text and structure of the statutes it cites to the text and structure of the Privacy Act. See *id.* at 6-15. The amicus's argument, moreover, relies on lower-court opinions, and the federal-court opinions he cites (other than FHA-related cases also cited by respondent) all post-date the Privacy Act—as do some of the statutes themselves. See *Doe*, 540 U.S. at 626-627 (rejecting reliance on post-1974 materials in interpreting Privacy Act); see, *e.g.*, Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 645-646 (26 U.S.C. 7431)); Fair Debt Collection Practices Act, Pub. L. No. 95-109, Title VIII, § 813, 91 Stat. 881 (1977) (15 U.S.C. 1692k)).

government may be subject to state-law emotional-distress or mental-distress remedies under the FTCA is accordingly irrelevant for purposes of interpreting the Privacy Act. In particular, and contrary to respondent's contention (*e.g.*, Br. 19), this Court's construction of the FTCA's exception for "punitive damages" in *Molzof* v. *United States*, *supra*, has no material bearing on the meaning of the Privacy Act's waiver of sovereign immunity for "actual damages."

Respondent also cites another portion of the FTCA, which provides that in certain cases where the act or omission of a government employee has resulted in someone's death, "the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof." 28 U.S.C. 2674. That language is unhelpful to respondent. To begin with, Congress's use of the disjunctive phrase "actual *or compensatory* damages" undercuts respondent's repeated assertion (*e.g.*, Br. 19) that the phrase "actual damages" is always synonymous with "compensatory damages." Furthermore, Congress's recognition that "pecuniary injuries" constitute a "measur[e]," as opposed to a limitation, of "actual or compensatory damages," reinforces the conclusion that such damages can appropriately be defined solely by reference to economic harm. 28 U.S.C. 2674; see also Gov't Br. 20 (citing examples of statutes and cases that define "actual damages" in purely pecuniary terms). Finally, even assuming "actual or compensatory damages" in the FTCA wrongful-death context could be read to encompass nonpecuniary harm, that would furnish no basis for finding an unequivocal waiver of sovereign immunity for claims of such harm under the "actual damages" provision of the Privacy Act, given the distinct text, background, and purposes of that Act.

E. To the extent that respondent alternatively bases his argument on sources intrinsic to the Privacy Act legislation, those sources provide him with no meaningful support. To begin with, respondent's discussion of the preamble and other non-remedial provisions of the Privacy Act (Br. 13-17) fares no better than the similar discussion in the Ninth Circuit's opinion. As the government explained in its opening brief, neither the expressly subsidiary—and descriptively inaccurate—language of the preamble, nor any other general reference to the Act's purposes, controls the construction of the operative text of the "actual damages" provision. Gov't Br. 37-41.

The only new twist respondent offers on the Ninth Circuit's discussion rests on a misreading of the Act's text. Respondent characterizes a Privacy Act provision requiring agencies to safeguard their records as imposing that requirement for the purpose of preventing "pecuniary and nonpecuniary 'harm,' including 'embarrassment, inconvenience, or unfairness'" to people whose information is in those records. Br. 17 (quoting 5 U.S.C. 552a(e)(10)) (emphasis omitted). But contrary to respondent's characterization, that provision does not list "embarrassment," "inconvenience," and "unfairness" as forms of "harm." Rather, the provision is phrased disjunctively—"harm, embarrassment, inconvenience, *or* unfairness," 5 U.S.C. 552a(e)(10) (emphasis added)—such that "embarrassment," "inconvenience," and "unfairness" are all distinguished from "harm." None of those terms, moreover, provides a definition of "actual damages."

Respondent's discussion of the Act's legislative history (Br. 35-41) similarly fails to advance his position. As a threshold matter, "legislative history cannot supply a [sovereign-immunity] waiver that does not appear clearly in any statutory text." *Lane*, 518 U.S. at 192. And in any

event, the legislative record, which demonstrates Congress's strong concern about protecting the public fisc, militates strongly against respondent's construction of "actual damages." Gov't Br. 29-32.

Respondent identifies no direct statement by any Member of Congress to the effect that "actual damages" includes awards for mental and emotional distress. The only statement addressing that issue is Representative Eckhardt's comment, on a version of the bill that provided for "actual damages," that "[t]here is nothing in this that would provide for any damages beyond [a plaintiff's] actual out-of-pocket expenses." 120 Cong. Rec. 36,956 (1974). Respondent asserts (Br. 53-54) that the comment referred to a hypothetical that Representative Eckhardt had posed two paragraphs earlier, about someone who had lost a job and associated wages as a result of a government record "falsely indicat[ing] his having been discharged when he had in fact resigned." 120 Cong. Rec. 36,955-36,956. But that interpretation overlooks the intervening paragraph, in which Representative Eckhardt spoke more generally of "a person who is actually injured" by a Privacy Act violation. *Id.* at 36,956. And even if respondent's view of a connection to the hypothetical were correct, it would not blunt the force of Representative Eckhardt's recognition that the only "damages" the plaintiff with lost wages could recover would be "out-of-pocket expenses," and not, for example, any award for mental or emotional distress arising from the dissemination of false information that he had been fired from government service.[4]

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[4] One of respondent's amici attempts to bolster respondent's construction of "actual damages" by pointing to the 1975 Privacy Act Guidelines issued by the Office of Management and Budget (OMB). EPIC Amicus Br. 30-31. This Court found those guidelines unhelpful in *Doe*, 540 U.S. at 627 n.11, and they are similarly uninformative here.

F. Lastly, respondent argues that the Act's privacy-protective purpose requires that its civil-remedies provision be construed to permit claims for mental and emotional distress. *E.g.*, Resp. Br. 33-35. A reference to general statutory purposes cannot establish a waiver of federal sovereign immunity. "[W]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." *Lane*, 518 U.S. at 197 (citation omitted).

The argument, in any event, lacks substantial force. It is undoubtedly true that protecting people from unnecessary "embarrassment" and the like was one of Congress's goals in passing the Privacy Act. 5 U.S.C. 552a(e)(10). But Congress did not pursue that goal singlemindedly. As the government pointed out in its opening brief, "[n]o legislation pursues its purposes at all costs," and deciding how far a particular statute should go "is the very essence of legislative choice." Gov't Br. 38 (quoting *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990)). Here, "it is undisputed" that, although Congress wanted to provide some civil remedies for Privacy Act violations, it also "did not want to saddle the Government with disproportionate liability." *Doe*, 540 U.S. at 637 (Ginsburg, J., dissenting).

Respondent contends (Br. 57-58) that the restriction of monetary liability to certain "intentional or willful" violations, 5 U.S.C. 552a(g)(4), was by itself a sufficient limita-

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The guidelines do not state that the Privacy Act permits awards for mental or emotional distress, see OMB, *Privacy Act Guidelines*, 40 Fed. Reg. 28,970 (1975); no deference would in any event be owed to a federal agency's interpretation of a provision administered solely by the courts, *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649-650 (1990); and the United States' sovereign immunity cannot be waived by executive action, see *OPM* v. *Richmond*, 496 U.S. 414, 424-434 (1990).

tion on the liability of the United States. But had Congress shared that view, it would not have categorically precluded an award of "general damages," even for intentional or willful violations. Privacy Act § 5(c)(2)(B)(iii), 88 Stat. 1907.

Respondent goes so far as to claim (Br. 34) that it would have been "absurd" for Congress not to have included awards for mental and emotional distress in the Privacy Act. As previously explained (pp. 12-13, *supra*), however, the Privacy Act exposed the government to liability in new ways under a broad new administrative-law framework that regulated the handling of agency records across the government. It was not only reasonable, but prudent, for Congress to proceed with caution by restricting monetary recovery to pecuniary harm and reserving the issue of awards for mental and emotional distress for further study by the Privacy Protection Study Commission and then by Congress. *Ibid.* And to the extent that the absence of further legislation providing such awards requires an affirmative explanation, the government's opening brief explains several reasons why drawing the line between pecuniary and nonpecuniary harm made sense. Among other things, a pecuniary-harm requirement assures that a plaintiff's damages will be objectively provable, readily quantifiable, and unlikely to result in extreme, uncapped monetary awards against the United States. Gov't Br. 32-35. Congress, moreover, could reasonably have viewed the existence of pecuniary harm as a workable proxy for circumstances serious enough to warrant a damages award—a distinction that the common law had long drawn in cases of defamation per quod. See *Doe*, 540 U.S. at 625-626.

Respondent errs in suggesting (Br. 35) that allowing recovery only in cases of pecuniary harm "simply create[s] incentives for aggrieved individuals to incur small pecuniary losses as a basis for suit." A plaintiff who manufactures

his own pecuniary harm will not be able to show damages arising "as a result of" a Privacy Act violation, 5 U.S.C. 552a(g)(4)(A), and will thus be ineligible to recover either those damages or the statutory minimum of $1000. Furthermore, respondent's construction of "actual damages" would create the far more troubling incentive for potential plaintiffs to claim difficult-to-disprove mental or emotional damages far in excess of $1000. Had Congress in fact intended to countenance that result, or to allow awards for mental or emotional distress at all, it would have expressed that intent clearly and unequivocally in the statutory text, as this Court's precedents require. *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992). Congress's use of the ambiguous term "actual damages," particularly in combination with its express exclusion of "general damages," does not express, let alone clearly and unequivocally express, any such intent.

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

OCTOBER 2011

AMICUS CURIAE BRIEF

No. 10-1024

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
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FEDERAL AVIATION ADMINISTRATION, ET AL.,
Petitioners,

v.

STANMORE CAWTHON COOPER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* AIDS FOUNDATION OF CHICAGO, AIDS LEGAL REFERRAL PANEL, APICHA, INC., GAY AND LESBIAN ADVOCATES AND DEFENDERS, GAY CITY HEALTH PROJECT, GLOBAL NETWORK OF PEOPLE LIVING WITH HIV, HIV LAW PROJECT, INTERIOR AIDS ASSOCIATION, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., LEGAL ACTION CENTER, METRO TEENAIDS, NATIONAL BLACK GAY MEN'S ADVOCACY COALITION, NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL IMMIGRANT JUSTICE CENTER, NATIONAL WOMEN'S HEALTH NETWORK, TRANSGENDER LEGAL DEFENSE AND EDUCATION FUND, AND WHITMAN-WALKER HEALTH IN SUPPORT OF RESPONDENT

HAYLEY J. GORENBERG
Counsel of Record
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585
hgorenberg@lambdalegal.org
Attorney for Amici Curiae

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[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Of Counsel

JON W. DAVIDSON
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
3325 Wilshire Boulevard, Ste. 1300
Los Angeles, CA 90010
(213) 382-7600
jdavidson@lambdalegal.org

SCOTT A. SCHOETTES
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
11 East Adams, Ste. 1008
Chicago, IL 60603
(312) 663-4413
sschoettes@lambdalegal.org

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AIDS Foundation of Chicago, AIDS Legal Referral Panel, APICHA, Inc., Gay and Lesbian Advocates and Defenders, Gay City Health Project, Global Network of People Living with HIV, HIV Law Project, Interior AIDS Association, Lambda Legal Defense and Education Fund, Inc., Legal Action Center, Metro TeenAIDS, National Black Gay Men's Advocacy Coalition, National Center for Lesbian Rights, National Immigrant Justice Center, National Women's Health Network, Transgender Legal Defense and Education Fund, and Whitman-Walker Health respectfully submit this brief as *amici curiae* in support of Respondent Stanmore Cawthon Cooper.[1]

STATEMENT OF INTEREST

The mission of the AIDS Foundation of Chicago (AFC) is to lead the fight against HIV/AIDS and improve the lives of people affected by the epidemic. Founded in 1985 by community activists and physicians, AFC is a local and national leader, collaborating with community organizations to develop and improve HIV/AIDS services; fund and coordinate prevention, care, and advocacy projects; and champion effective, compassionate HIV/AIDS

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Pursuant to the letters filed with the Clerk, *amici curiae* have permission of all parties to file.

policy. Medical records contain vital information about a patient's medical history, as well as the medical care provided by hospitals, physicians and other health care providers. A patient's financial and insurance information may also be included in the medical record. AFC believes non-voluntary disclosure of a person's HIV status violates the law. It is also a corrosive social driver that fosters distrust of medical professionals and institutions, particularly amongst people of color, contributing to medical nonadherence among HIV-positive individuals.

AIDS Legal Referral Panel (ALRP) provides free or low-cost legal services to people living with HIV/AIDS in the San Francisco Bay Area. For twenty-eight years ALRP has helped people with HIV/AIDS with a range of civil legal issues, including confidentiality. Through its work, ALRP is keenly aware of the importance to individuals living with HIV/AIDS of privacy protections to prevent disclosure of confidential medical information. ALRP urges this Court to address the issues raised in this case in a manner that maintains the protective purposes of the federal Privacy Act.

APICHA, Inc. (APICHA), a community-oriented health center in New York City, provides comprehensive HIV/AIDS services including primary care, mental health services, bilingual case management, HIV risk-reduction counseling, HIV and sexually transmitted disease screening and various supportive services for people living with and affected by HIV/AIDS. APICHA has been providing these services for over twenty-one years. APICHA's patients largely come from the

Asian and Pacific Islander communities and other communities of color where stigma of HIV/AIDS remains quite intense. For this reason, APICHA recognizes the importance of privacy protections to prevent disclosure of confidential medical information. APICHA urges this Court to address the issues raised in this case in a manner that furthers the protective purposes of the Federal Privacy Act.

Gay and Lesbian Advocates and Defenders (GLAD) is a public interest legal organization dedicated to ending discrimination based upon sexual orientation, HIV status, and gender identity and expression. GLAD's AIDS Law Project, founded in 1984, has litigated numerous cases of discrimination and privacy violations involving people with HIV. GLAD was counsel in *Bragdon v. Abbott*, 524 U.S. 624 (1998), which involved a dentist who refused to provide dental care to people with HIV.

Gay City Health Project (GCHP), located in Seattle, Washington, is a multicultural gay men's health organization and the leading provider of HIV testing for gay and bisexual men in Washington State. Founded in 1995, GCHP promotes the health of gay and bisexual men (including those who are transgender) and prevents HIV transmission by building community, fostering communication, and nurturing self-esteem. Through its work, GCHP is keenly aware of the importance to individuals living with HIV/AIDS of privacy protections to prevent disclosure of confidential medical information. GCHP urges this Court to address the issues raised in this case in a manner that maintains

the federal Privacy Act's protection against psychological and emotional harms most commonly caused by disclosures against one's will.

The Global Network of People Living with HIV, North America (GNP+NA), is the only regional organization consisting entirely of, and representing, HIV-positive people in North America. Founded in 1997, GNP+NA's purpose is to improve the quality of life of people living with HIV. GNP+NA works with five other regional networks and a global secretariat to facilitate opportunities for people with HIV to come together to work for human rights protections within their own regions, to work together in solidarity with people with HIV in other regions, to build leadership skills and support empowerment of people with HIV, and to bring attention at home to issues that affect people with HIV around the world. In North America, GNP+NA's work is focused on four areas that are of key importance to people living with HIV: challenging stigma and discrimination, ending legal discrimination against people with HIV, ensuring equitable access to treatment and care for people with HIV across North America, and bringing together the voices of people with HIV to define and defend the human rights agenda for HIV-positive people in North America. Addressing stigma and discrimination is fundamental to all of GNP+NA's work. In GNP+NA's experience as people with HIV, who work with others throughout the U.S. and the region, the stigma and discrimination that accompany an HIV-positive serostatus can be more harmful than the virus itself. Of particular concern to us is the ability for people living with HIV to feel empowered to care for their health, protect their

loved ones from infection, and advocate for their rights and health needs. Good social, legal, and mental health support systems, including strong and reliable privacy protections, are required for this to be reality. Maintaining control over one's private health information is necessary for people with HIV to be able to engage fully in their own treatment, care, and advocacy.

HIV Law Project believes that all people deserve the same rights, including the right to live with dignity and respect, the right to be treated as equal members of society, and the right to have their basic human needs fulfilled. These fundamental rights are elusive for many people living with HIV/AIDS. Through innovative legal services and advocacy programs, HIV Law Project fights for the rights of the most underserved people living with HIV/AIDS. HIV Law Project has represented victims of HIV confidentiality breaches, and has seen first hand the devastation such a breach can cause in the life of an individual. HIV Law Project urges this Court to uphold the protections of the federal Privacy Act.

The Interior AIDS Association (IAA) provides case management and support services to people living with HIV/AIDS in Fairbanks, Alaska. For twenty-one years, IAA has helped people with HIV/AIDS access medical care, housing and other support services. IAA is keenly aware of the importance to individuals living with HIV/AIDS of privacy protections to prevent disclosure of confidential medical information. IAA's clients have experienced the real, negative impact of confidentiality violations on their housing,

employment, and access to care. IAA urges this Court to address the issues raised in this case in a manner that furthers the protective purposes of the federal Privacy Act.

Lambda Legal Defense and Education Fund, Inc. (Lambda Legal) is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work. Lambda Legal brought and won the first HIV discrimination case in the country, and has a dedicated HIV Project. Lambda Legal was counsel in *Lawrence v. Texas*, 539 U.S. 558 (2003) and regularly files *amicus* briefs with the Supreme Court on issues affecting the rights and interests of people living with HIV.

Legal Action Center (LAC) is a national public interest law firm, founded in 1972, that performs legal and policy work to fight discrimination against and promote the privacy rights of individuals with criminal records, alcohol/drug histories, and/or HIV/AIDS. LAC has a multifaceted approach that involves direct client legal services and impact litigation, technical assistance and training to agencies that serve LAC's clientele, and policy advocacy to create systemic changes that will benefit LAC's constituency. LAC has represented many individuals whose right to privacy in their HIV information has been violated under New York State and federal law – both the Privacy Act and United States Constitutional right to privacy. LAC's clients often have no direct economic harm as a result of these privacy violations, but they suffer tremendous emotional harm. Obtaining redress for such harm is

critical. The question posed in this case is of vital concern to LAC's constituency across the country.

Metro TeenAIDS (MTA) is a community health organization dedicated to supporting young people in the fight against HIV/AIDS. Through education, support, and advocacy, MTA works to prevent the spread of HIV, promote responsible decision-making, and improve the quality of life for young people infected with, or affected by, HIV/AIDS. MTA is the only organization in the Washington DC-metro area focusing all of its efforts on the unique prevention, education, and treatment needs of young people. Since its inception almost twenty years ago, MTA has provided education programs and prevention resources to well over 200,000 young people, family members, and youth workers in Washington, Maryland, and Virginia. MTA is accurately aware of the role confidentiality plays in successfully reaching and helping young people living with or impacted by HIV/AIDS. MTA urges the Court to preserve the protective purposes of the federal Privacy Act when contemplating the issues raised in this case.

The National Black Gay Men's Advocacy Coalition (NBGMAC) is committed to improving the health and wellbeing of black gay men. According to the Centers for Disease Control and Prevention's (CDC) report on HIV incidence in the United States, between 2006 and 2009, black gay men between thirteen and twenty-nine years of age experienced a forty-eight percent increase in new HIV infections. In a five-city study of HIV prevalence, the CDC reported that forty-six percent of black men who have sex with men were HIV-positive, and sixty-seven percent of them were unaware of their HIV

status. Stigma and discrimination caused by loss of privacy are critical barriers to HIV testing and care-seeking. In order to achieve the goals of the National HIV/AIDS Strategy and an end to the epidemic, NBGMAC believes that federal policies must work to eliminate marginalizing, stigmatizing and discriminatory practices. NBGMAC's organizational and individual members are working across the United States to provide culturally competent, high-quality services. NBGMAC encourages the Court to protect the privacy of people living with HIV, which will foster an environment where all persons have knowledge of their HIV status without fear of increased vulnerability caused by unwarranted disclosure of their diagnosis.

The National Center for Lesbian Rights (NCLR) is a national legal organization dedicated to achieving equality for lesbian, gay, bisexual and transgender people and their families through impact litigation, public policy advocacy, and community and public education. NCLR has served as counsel in numerous state and federal court cases securing constitutional rights for LGBT people, including the right to privacy for individuals living with HIV.

The National Immigrant Justice Center (NIJC), a program of Heartland Alliance for Human Needs and Human Rights, is a Chicago-based nonprofit that engages in public-policy advocacy, impact litigation, and direct representation on behalf of immigrants. With the assistance of *pro bono* partners, NIJC provides free and low-cost legal services to approximately 8,000 immigrants, refugees, and asylum seekers each year. NIJC's

work ranges from brief consultations to full representation in immigration proceedings or in federal court. NIJC is invested in the outcome of this case because NIJC has observed significant and consistent privacy violations throughout the immigration system. Particular to this case, NIJC has observed the improper disclosure of the HIV status of immigrants, many of whom have experienced discrimination and even persecution because of their HIV status.

The National Women's Health Network improves the health of all women by developing and promoting a critical analysis of health issues in order to affect policy and support consumer decision-making. The NWHN aspires to a healthcare system that is guided by social justice and reflects the needs of diverse women, including those women living with HIV or AIDS. The NWHN recognizes the stigma associated with HIV/AIDS, the discrimination that many HIV-positive women experience, and the serious harm that can result from nonconsensual disclosure of a woman's HIV status. The NWHN further recognizes that the negative consequences of nonconsensual disclosure for a woman might include damage to her mental health as well as her physical wellbeing. One of the NWHN's core values is the NWHN's belief that the government has an obligation to safeguard the health of all people, including through protection of private health information.

Transgender Legal Defense and Education Fund is committed to ending discrimination based upon gender identity and expression and to achieving equality for transgender people through public education, test-case litigation, direct legal services,

community organizing and public policy efforts. Transgender people are intensely concerned about the unauthorized release of private medical information, including information related to HIV status. Recent studies have found that transgender people have an HIV infection rate more than four times the national average. Transgender women have an HIV infection rate more than seven times the national average. Rates for other segments of the transgender population, including those who are unemployed and people of color, are even higher. For transgender people, the release of HIV-related and other private and sensitive medical information can result in stigma, discrimination and even violence. These consequences are often unrelated to financial loss. For these reasons, TLDEF urges the court to affirm the decision below and rule that the Privacy Act protects people from the disclosure of personally sensitive information without regard to financial loss.

Whitman-Walker Clinic, Inc., d/b/a Whitman-Walker Health (Whitman-Walker), is a nonprofit, community-based health organization serving the Washington, D.C. metropolitan area. Whitman-Walker provides primary health care and HIV/AIDS, lesbian, gay, bisexual and transgender medical care; mental health and substance abuse treatment; dental care; medical adherence case management; legal services; and HIV and sexually transmitted infection testing, counseling and prevention services, to more than 13,000 individuals annually. Over the last three decades, Whitman-Walker has become a nationally known expert in HIV/AIDS treatment and prevention. For twenty-five years, Whitman-

Walker's Legal Services Program has provided *pro bono* legal advice and representation to many thousands of persons living with HIV/AIDS throughout the Washington, DC metropolitan area. Whitman-Walker's practice includes employment discrimination, workplace rights and protection of medical privacy; Whitman-Walker's staff and volunteer lawyers have seen many instances of violations of confidentiality by federal agencies, particularly as employers, and Whitman-Walker has repeatedly invoked the Privacy Act to protect Whitman-Walker's clients and obtain redress for violations. In the experience of Whitman-Walker's doctors, nurses and other healthcare providers, therapists, lawyers and prevention workers, HIV stigma and discrimination remain major problems. Robust legal safeguards for medical confidentiality, including adequate monetary compensation for emotional distress that results from unlawful disclosure of medical information, are vital to encouraging persons with HIV, and those at risk of infection, to be tested and to engage in care.

INTRODUCTION AND SUMMARY

Amici agree with the arguments of Respondent Stanmore Cawthon Cooper ("Respondent") that Congress plainly intended the federal Privacy Act's "actual damages" provision to authorize recovery for precisely the type of harmful disclosures and injuries that Respondent suffered when federal government agencies illegally disclosed his private medical information. The nonconsensual release of intensely private information, including the human immunodeficiency virus (HIV)-related medical information involved in this case, is precisely the kind of injury the Privacy Act seeks to remedy. In providing for the recovery of "actual damages," without specifying any restriction to pecuniary loss (5 U.S.C. § 552a(g)(1)(4)), Congress unambiguously authorized recovery for mental and emotional distress. Settled principles of statutory construction squarely demonstrate that understanding. Should the Court find it necessary to proceed further and delve into the legislative history, that history likewise shows that Congress contemplated coverage for violations of privacy that can cause quite serious nonpecuniary harm, but may not give rise to financial injuries. In sum, all of these factors support Respondent's argument and the holding of the circuit court below that the federal Privacy Act clearly and unequivocally protects against illegal disclosures that cause nonpecuniary harm.

Amici curiae have responded to Petitioners' efforts to overturn the decision below because they are professional organizations serving people throughout the United States who are living with

the human immunodeficiency virus (HIV). *Amici* have direct knowledge of the intense fear that many people living with HIV have of unauthorized disclosure of their HIV status, because such disclosures often lead to intense stigma, discrimination, and psychological injuries. *Amici* know the life-changing impact of unauthorized disclosure—typically a severe personal impact, even though it may more rarely be a financial one.

Amici seek to make clear to this Court the appropriateness of finding that the Privacy Act's protections cover nonpecuniary harms, given standard principles of statutory construction and the understanding of actual damages prevailing at the time of the Act's enactment. Further, *amici* emphasize the significance of Congress' choice to extend the Privacy Act's protections beyond individual finances (where, for instance, employment discrimination law may already provide some relief if a job is lost based upon discrimination), to include impact on emotional and sometimes physical safety, community standing, and a range of other extremely important, vividly real, and almost exclusively nonpecuniary consequences. People desire to protect their private medical information largely because of its personal sensitivity—and certainly not just because someone else's appropriation of the private information might affect their wallets. For these reasons, as further explained below, *amici* support affirming the result below.

ARGUMENT

I. The Harm Mr. Cooper Suffered Constitutes Precisely the Type of Injury Congress Contemplated as Giving Rise to "Actual Damages" Recoverable Under the Privacy Act.

Under this case's current procedural posture, it is undisputed that Petitioners engaged in disclosures prohibited by the Privacy Act, that there is evidence that those disclosures were intentional or willful, and that the disclosures caused Mr. Cooper real and appreciable mental and emotional distress. Given standard principles of statutory construction, which the Ninth Circuit Court of Appeals applied thoroughly and skillfully below (*Cooper v. FAA*, 622 F.3d 1016 (9th Cir. 2010)), this Court should recognize the soundness of Mr. Cooper's argument and affirm the decision below. The injuries sustained here are the natural and primary consequence of unlawful disclosures of medical records, are the kind of injuries Congress was concerned about when it passed the Privacy Acct in 1974, and are forms of "actual damages" as that term was plainly defined and understood in common law at that time.

Because Mr. Cooper has ably covered the pertinent statutory construction analysis (see Br. for the Resp't *FAA v. Cooper*, No. 10-1024 (2011) (hereinafter "Resp't Br.") at 12-17, *amici* do not repeat those points and instead highlight some additional material within the legislative history that further confirms Mr. Cooper's analysis. Myriad excerpts from the Act's legislative history indicate that the harms Congress intended to cover where in

the main nonpecuniary. For instance, it is striking that, leading up to enactment, the Congressional Record references the need for privacy protections after the government's 1971 break-in to a psychiatrist's office. *See, e.g.,* 120 Cong. Rec. 32,848 (1974) (Sen. Nelson) (citing the invasions as "a clear and dramatic illustration of the problem" of governmental intrusion on matters that should remain private and discussing the particular dangers of government intrusion of privacy); 120 Cong. Rec. 36,901 (1974) (Sen. Nelson) (citing examples of government invasions of privacy). As Senator Gaylord Nelson urged, "A society cannot remain free and tolerate a Government which can invade an individual's privacy at will." 120 Cong. Rec. 36,901 (1974). Sen. Nelson went on to quote Justice Stephen Field's 1888 opinion excerpted in *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894):

> Of all the rights of the citizens, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books and papers from the scrutiny of others. Without enjoyment of this right, all others would lose half their value.

120 Cong. Rec. 36,902 (1974) (statement by Sen. Nelson). The Senator concluded, "A right so vital to individual liberty and, indeed, to our constitutional system deserves rigorous protection by Congress—the people's chosen representatives." *Id.*

Other members of Congress echoed these concerns and cogently explained what the law would protect. Fellow Senator Samuel J. Ervin warned of the personal danger of unauthorized information-sharing by the government, stating "The protection of personal privacy is no easy task. It will require foresight and the ability to forecast the possible trends in information technology and the information polices of our Government and private organizations before they actually take their toll in widespread invasions of the personal privacy of large numbers of individual citizens." 120 Cong. Rec. 12,646 (1974). He added, "One of the most obvious threats the computer poses to privacy comes in its ability to collect, store and disseminate information *without any subjective concern for human emotion* and fallibility." 120 Cong. Rec. 12,647 (1974) (emphasis added).

Senator Charles H. Percy likewise urged that the Act was needed to protect sensitive personal information:

> Today, almost every fact about us is on file somewhere in this country. Federal census surveys record our household, family, and personal lives. . . . Hospital and physician files register intimate facts about our physical and mental wellbeing. . . . The list may be virtually endless because new systems of files are constantly being created.

120 Cong. Rec. 36,893 (1974). Tellingly—and logically—these explications of Congressional

concern contained no reference at all to financial consequences of privacy breaches.

Interpretation of the Privacy Act should not diverge from the basic understanding, both in law and logic, of the concept of privacy, its importance, and the ample nonpecuniary consequences of unauthorized disclosure—as acknowledged specifically and powerfully throughout privacy case law in this country. It has long been recognized that while laws protecting privacy may use financial compensation as "rough justice" to compensate victims of improper intrusions on privacy, the harms those laws address are primarily nonpecuniary. Privacy has long been valued for reasons that have little to do with one's pocketbook. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374, 385 n.9 (1967) ("In the 'right of privacy' cases the primary damage is the mental distress from having been exposed to public view[.]"); *Fairfield v. Am. Photocopy Equip. Co.*, 291 P.2d 194, 197 (Cal. Ct. App. 1955) ("The gist of the cause of action in a privacy case is not injury to the character or reputation, but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community. . . . The injury is mental and subjective. It impairs the mental peace and comfort of the person and may cause suffering much more acute than that caused by a bodily injury." (internal citations omitted)) Congress itself recognized this, enacting the Privacy Act in order to allow individuals to hold federal agencies accountable for "any damages" resulting from violations of

individual rights under the Act (Privacy Act of 1974, Pub. L. No. 93-579, § 2(b)(6), 88 Stat. 1896, 1896 (1974)) and specifically including instructions to federal agencies to "establish . . . safeguards" protecting against "substantial harm, embarrassment, inconvenience, or unfairness[.]" 5 U.S.C. § 552a(e)(10).[2]

The Court of Appeals properly relied upon such material, below:

> Congress's intent that the Act offer relief in the form of "any damages" resulting from a violation of one's right of privacy begs the question of what types of injuries typically result from the violation of such a right. The Supreme Court has observed that "[i]n the 'right of privacy' cases the primary damage is the mental distress from having been exposed to public view." *Time, Inc. v. Hill*, 385 U.S. 374, 386 n.9, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967); *see also Restatement (Second) of Torts* § 652H(b) (1977) ("One who has established a cause of action for invasion of his privacy is entitled to recover damages for . . . his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion . . . ."). The related common-law tort of defamation also

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[2] The Supreme Court's decision in *Doe v. Chao*, requiring proof of actual damages for an injured party to garner any compensation under the Privacy Act, safeguards the government against awards unsupported by a showing of damages of any type. *Doe v. Chao*, 540 U.S. 614, 618 (2004).

> provides monetary relief for nonpecuniary harms. In defamation cases, the Supreme Court has stated that "the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

Cooper, 622 F.3d at 1029-1030.

Similarly, following this Court's decision in *Doe v. Chao*, 540 U.S. 614 (2004), the Fifth Circuit reconfirmed its analysis that actual damages include compensation for proven mental or emotional distress. *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). In *Jacobs*, the Fifth Circuit quoted the straightforward point that the district court had made during summary judgment argument in that case:

> [A]ctual damages are actual damages. It is what it is. Surely Congress knew that when they passed this statute. And so, therefore, I don't see how we get around it. I mean, actual damages are traditionally viewed to include [emotional-distress damages]. Under the Privacy Act, that would probably be the main source of damage as far as any actual damages someone might have . . . .

Id. at 377 (alteration in original) (quoting Tr. of Hr'g on Mot. for Summ. J. at 4, 8, *Jacobs v. Nat'l Drug Intelligence Ctr.*, No. 5:01-CV-72 (S.D. Tex. Dec. 7,

2006)); *but see* Opening Br. of Plf.-Appellant at 46-47 *Cooper v. FAA* 622 F.3d 1016 (9th Cir. 2010) (No. 08-17074) (discussing rulings in other courts).

Scholarly analysis of the Act's legislative history has similarly yielded the conclusion that the Act recognizes nonpecuniary harms as "actual damages" deserving compensation: "Debate on potentially excessive liability, however, focused on establishing the proper level of conduct to trigger such liability and whether punitive damages against the government should be available. There is no indication in the legislative history of congressional intent to limit compensation to proven economic loss." Frederick Z. Lodge, Note, *Damages Under the Privacy Act of 1974: Compensation and Deterrence*, 52 Fordham L. Rev. 611, 626 (1984) (footnotes omitted). "The drafters of the Privacy Act specifically sought to deter government officials from the exact conduct exhibited by the agencies in *Cooper*.... Because the legislative language and the purpose of the Privacy Act seek to protect citizens from embarrassment and from invasion into their private papers and records, and because not compensating for that emotional harm would lead to a minimal deterrence against such conduct, the phrase 'actual damages' within the Privacy Act should include emotional and mental harms as compensable injuries." Nicole M. Quallen, Damages Under the Privacy Act: Is Emotional Harm "Actual"?, 88 N.C. L. Rev. 334, 356 (2009).

Furthermore, it would create a nonsensical and wasteful scheme if a plaintiff had standing to bring a Privacy Act claim based on the "adverse effect" of emotional and psychic harm, yet was deprived of any

remedy for that harm, once proved. Under that scheme, plaintiffs could set foot in the courthouse and put cases before judges based upon assertions that—even when proven—could never yield compensation. The Ninth Circuit recognized that illogic in overturning the trial court's decision. *Cooper*, 622 F.3d 1016.

In contrast to claims for breach of contract, fraud or violations of the securities and copyright laws, which naturally cause economic injuries, privacy laws—whether constitutionally-derived, found in tort law, or delineated in specific privacy statutes—center on the dignitary harms, humiliation, psychic pain and mental injury, and sometimes accompanying physical distress naturally suffered by those whose privacy is invaded. It therefore is only sensible that the "actual damages" that violations of privacy give rise to are mental and emotional distress damages, not just those that yield pecuniary loss. The plain language of the Privacy Act and the legislative record confirm that this clearly and unequivocally was Congress's intent.

II. The Nonpecuniary Harm Caused by Unauthorized Disclosure of HIV-Related Medical Information Illustrates Why a Pecuniary Limitation Should Not Be Grafted Onto the Privacy Act's "Actual Damages" Provision.

One cannot understate the significant harm to privacy interests that would be caused by engrafting a "pecuniary" limitation onto "actual damages"—a limitation that Congress did not itself provide in the Privacy Act's text. The impact is easily seen in the

serious and appreciable "actual damages" directly at issue in this case. *Amici* vehemently disagree that the government should be permitted to inflict such injuries with impunity, contrary to the clear and explicit compensation, deterrence and accountability objectives Congress had in adopting the Act.

The medical records of people living with HIV are likely to reveal not only data about their HIV disease, but also other very sensitive, private information. That is so because the treatment of HIV (and other blood-borne and sexually transmitted diseases) and the counseling that surrounds a diagnosis frequently involve discussions of deeply private topics such as a patient's sexual activities, recent sexual partners, drug use, or other high-risk behaviors. Surveys reveal that people with HIV continue to experience significant levels of disapproving moral judgment.[3] Indeed, "[s]ociety's

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[3] *See, e.g.*, Gregory M. Herek et al., *HIV-Related Stigma and Knowledge in the United States: Prevalence and Trends, 1991-1999*, 92 Am. J. Pub. Health 371 (2002); Patricia G. Devine et al., *The Problem of "Us" Versus "Them" and AIDS Stigma*, 42 Am. Behav. Sci. 1212, 1212-1219 (1999). Several national surveys reveal that stigmatizing attitudes towards people with HIV appear to be greatest among heterosexuals who also express negative attitudes towards gay people. *See, e.g.*, Gregory M. Herek et al., *Stigma, Social Risk, and Health Policy: Public Attitudes Toward HIV Surveillance Policies and the Social Construction of Illness*, 22 Health Psychol. 533, 536 (2003); Gregory M. Herek & John P. Capitanio, *AIDS Stigma and Sexual Prejudice*, 42 Am. Behav. Sci. 1130, 1130 (1999); Gregory M. Herek & John P. Capitanio, *Symbolic Prejudice or Fear of Infection? A Functional Analysis of AIDS-Related Stigma Among Heterosexual Adults*, 20 Basic & Applied Soc. Psychol. 230, 239 (1998). HIV stigma also is exacerbated by negative attitudes about injecting drug users, who are highly

moral judgments about the high-risk activities associated with the disease, including sexual relations and drug use, make the information of the most personal kind." *Doe v. Borough of Barrington*, 729 F. Supp. 376, 384 (D.N.J. 1990) (finding that potential for harm after AIDS disclosure is "substantial" and ruling that borough violated family's constitutional right to privacy when police officers revealed information to others in community).

Because of the societal stigma surrounding HIV, AIDS, and the private behaviors frequently associated with HIV infection, the disclosure of HIV-related information can be very harmful—and even dangerous—for people living with HIV. As the Third Circuit found in *Doe v. Delie*, "the privacy interest in information regarding one's HIV status is particularly strong because of the stigma, potential for harassment, and 'risk of much harm from non-consensual dissemination of the information.'" *Doe v. Delie*, 257 F.3d 309, 315 (3d Cir. 2001) (quoting *Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1140 (3d Cir. 1995). *See also, e.g., Matson v. Bd. of Educ. of City Sch. Dist. of N.Y.*, 631 F.3d 57, 64 n.6 (2d Cir. 2011) (even in 2011, with greatly improved treatments, "a person infected with HIV may face an 'unfortunately unfeeling attitude among many in

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stigmatized. *See, e.g.*, Devine et al., *Problem of "Us" Versus "Them," supra.* For example, a national survey found that 72% of respondents agreed with the statement, "I think people who inject illegal drugs are disgusting." John P. Capitanio & Gregory M. Herek, *AIDS-Related Stigma and Attitudes Toward Injecting Drug Users Among Black and White Americans*, 42 Am. Behav. Sci. 1148, 1152 (1999).

this society' and 'expose[] herself not to understanding or compassion but to discrimination and intolerance.'" (quoting *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994)); *Doe v. Chand*, 781 N.E.2d 340, 352 (Ill. App. Ct. 2002) (Kuehn, J., concurring in part, dissenting in part) (discussing importance of remedies for violations of state HIV confidentiality provisions, which were included in the statute because "the legislature . . . recognized the social stigma that attaches" to individuals known to be infected with HIV, who "are pariahs, treated only slightly better than how people used to treat a leper who escaped from the colony.")

Although nearly thirty years have passed since physicians reported the first cases of HIV in the United States, HIV-related stigma continues to be prevalent and well documented.[4] "Large segments of the public remain uneducated about HIV and how it is transmitted, which promotes fear and antipathy" that can "often translate into biased and discriminatory actions." Katherine R. Waite et al., *Literacy, Social Stigma, and HIV Medication Adherence*, 23 J. Gen. Internal Med. 1367, 1367 (2008); *see also* Brad Sears and Deborah Ho, Williams Institute, *HIV Discrimination in Health*

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[4] *See, e.g.*, Peter A. Vanable et al., *Impact of HIV-Related Stigma on Health Behaviors and Psychological Adjustment Among HIV-Positive Men and Women*, 10 AIDS & Behav. 473 (2006); Gregory M. Herek et al., *When Sex Equals AIDS: Symbolic Stigma and Heterosexual Adults' Inaccurate Beliefs about Sexual Transmission of AIDS*, 52 Soc. Probs. 15 (2005); Herek et al., *HIV-Related Stigma*, *supra* note 3; D.A. Lentine et al., *HIV-Related Knowledge and Stigma – United States, 2000*, 49 Morbidity and Mortality Wkly. Rep. 1062 (2000), *available at* http://www.cdc.gov/mmwr/PDF/wk/mm4947.pdf.

Care Services in Los Angeles County: The Results of Three Testing Studies 1-2 (2006)[5] (reporting that studies conducted from 2003 to 2005 found that 55% of obstetricians, 46% of skilled nursing facilities, and 26% of plastic and cosmetic surgeons in Los Angeles County refused to treat patients living with HIV); Ronald A. Brooks et al., *Preventing HIV Among Latino and African American Gay and Bisexual Men in a Context of HIV-Related Stigma, Discrimination, and Homophobia: Perspectives of Providers*, 19 AIDS Patient Care & STDs 737, 738 (2005) (referencing 2003 report of American Civil Liberties Union survey finding that HIV stigma resulted in denials of medical treatment, privacy violations, and refused admittance to nursing homes).

Research indicates that HIV is viewed more negatively than many other stigmatized conditions, and fully one-third of Americans have reported negative attitudes toward people living with HIV. Deepa Rao et al., *Stigma, Secrecy, and Discrimination: Ethnic/Racial Differences in the Concerns of People Living with HIV/AIDS*, 12 AIDS & Behav. 265, 265-66 (2008). The persistence of stigma for people living with HIV was documented by a recent national survey conducted by the Kaiser Family Foundation. Although HIV cannot be transmitted through casual contact, the Kaiser survey revealed that only thirty-six percent of respondents reported that they would be very comfortable with their child having an HIV-positive

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[5] This document is available at http://escholarship.org/uc/item/1bm2p4gv#page-2 (last visited Oct. 3, 2011).

teacher, and only forty-nine percent reported that they would be very comfortable working with someone who has HIV or AIDS. Kaiser Fam. Found., *Kaiser Fam. Found. 2011 Survey of Americans on HIV/AIDS* 8 (June 2011), *available at* http://www.kff.org/kaiserpolls/upload/8186.pdf (hereinafter "Kaiser 2011"). A Kaiser survey released five years prior showed similar results regarding transmission, including the news that forty-three percent of people harbor one or more misconceptions about how HIV is transmitted, and people who harbor misconceptions are more likely to express discomfort about working with someone who is HIV-positive. Kaiser Fam. Found., *Kaiser Pub. Opinion Spotlight: Attitudes about Stigma and Discrimination Related to HIV/AIDS* 7-8 (Aug. 2006).[6] The same survey also revealed that many people still lack basic knowledge about how HIV is and is not transmitted. *Id.* at 7. Lack of knowledge contributes to stigma and discrimination, but as Justice Scott of the Supreme Court of Kentucky noted, even having such "knowledge often does not remedy the discrimination towards and the stigma felt by persons infected by the disease." *Melo v. Barnett*, 157 S.W.3d 596, 600 (Ky. 2005) (Scott, J., dissenting).

Courts have repeatedly recognized the stigma experienced by people living with HIV and the link between stigma and discrimination. For example, the district court for the Eastern District of New

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[6] This document is available at http://www.kff.org/spotlight/hivstigma/upload/Spotlight_Aug06_Stigma.pdf.

York observed that "HIV-infected persons necessarily struggle with many stresses in their lives, including . . . rejection of friends and family, stigma, and discrimination." *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 186 (E.D.N.Y. 2000), *aff'd*, 331 F.3d 261 (2d Cir. 2003); *see also, e.g.*, *Matson*, 631 F.3d at 64 (comparing HIV/AIDS to other medical conditions and noting that such a diagnosis is "excruciatingly private and intimate [in] nature" and "likely to provoke . . . an intense desire to preserve one's medical confidentiality" (quoting *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999)); *see also Poveromo-Spring v. Exxon Corp.*, 968 F. Supp. 219, 228 (D.N.J. 1997) ("A myriad of diseases carry with them social stigma, for example, syphilis or even cirrhosis of the liver. If intentionally disclosed, while a misfortune, the physician's conduct would likely not fall within the realm of extreme and outrageous. AIDS is different. It has a stigma attached to it unparalleled by any other disease."); *Hauser v. Volusia Cnty. Dep't of Corr.*, 872 So. 2d 987, 991-92 (Fla. 1st DCA 2004) ("The stigmatizing effect of being associated with the AIDS virus is so self-evident as to need no further elaboration."); *Estate of Behringer v. Med. Ctr. at Princeton*, 592 A.2d 1251, 1269-70, 1272 n.12 (N.J. Super. Ct. Law Div. 1991) (noting that "[u]nauthorized disclosure of a person's serologic status can lead to social opprobrium among family and friends" and citing examples of "hysterical public reaction to AIDS."); *Woods v. White*, 689 F. Supp. 874, 876 (W.D. Wis. 1988) (discussing highly personal nature of information about AIDS and ruling that prison officials violated prisoner's rights by disclosing his status to nonmedical staff and other

inmates), *aff'd without reported opinion*, 899 F.2d 17 (7th Cir. 1990). "The particular associations AIDS shares with sexual fault, drug use, social disorder, and with racial minorities, the poor, and other historically disenfranchised groups accentuates the tendency to visit condemnation upon its victims." *Cain v. Hyatt*, 734 F. Supp. 671, 680 (E.D. Pa. 1990) (quoting Susan Sontag, *AIDS and Its Metaphors* 44-46, 54-59 (1989)).

Again and again, the harms of disclosure prove to be primarily nonpecuniary. In the Kaiser 2011 survey, more than three-quarters (77%) of those surveyed for the report said they believe that there is "some" or "a lot" of discrimination against people with HIV/AIDS.[7] They are right: Statistics from the U.S. Equal Employment Opportunity Commission (EEOC) show that over the last decade, the number of HIV-related complaints filed under the Americans with Disabilities Act (ADA) has remained consistent.[8] From 2001 through 2005, there were 1094 complaints received, and from 2006 through 2010, the complaints received numbered about the same: 1081.[9] Moreover, these numbers do not include HIV-related ADA charges filed with state and local agencies.

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[7] Kaiser 2011 at 9.

[8] Equal Employment Opportunity Commission, *ADA Charge Data by Impairment/Bases – Receipts FY 1997 – FY 2010*, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm (last visited Oct. 3, 2011).

[9] *Id.*

People living with HIV frequently find themselves discriminated against, victimized by hate crimes, and cut off from family and friends. *See Doe v. Coughlin*, 697 F. Supp. 1234, 1237 (N.D.N.Y. 1988) (recognizing that people living with AIDS may be abandoned by family members). The Centers for Disease Control and Prevention's strategic plan for HIV prevention for the years 2007 to 2010 recognized the continuing importance of interventions to reduce both HIV stigma and discrimination. [10] The problem persists: the subsequent National HIV/AIDS Strategy for the United States, released in July 2010, reiterated the call to address stigma and discrimination, noting, "[t]he stigma associated with HIV remains extremely high and fear of discrimination causes some Americans to avoid learning their HIV status, disclosing their status, or accessing medical care."[11] Further underscoring the issue, the Centers for Disease Control and Prevention's Division of

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[10] *See* Centers for Disease Control and Prevention, *HIV Prevention Strategic Plan: Extended Through 2010* 12-13 (Oct. 2007), *available at* http://www.cdc.gov/hiv/resources/reports/psp/pdf/psp.pdf.

[11] The White House Office of Nat'l AIDS Pol'y, *Nat'l HIV/AIDS Strategy for the U.S.* ix (2010), *available at* http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf (citing Mahajan AP, Sayles JN, Patel VA, et al. *Stigma in the HIV/AIDS epidemic: A review of the literature and recommendations for the way forward*, AIDS 2008;22 (Suppl 2):S67-S69.) It follows that if people have appropriate control over information concerning their HIV status, they are more likely to get tested and to undergo treatment. Thus, not having effective remedies for invasion of privacy, which help deter unauthorized disclosures, may have serious adverse public health consequences.

HIV/AIDS Prevention Strategic Plan 2011-2015 mandates investigation of stigma as one of the "drivers of the domestic HIV epidemic."[12]

The disclosure that a person has HIV frequently wreaks emotional havoc on that person's life. *See, e.g., Kinzie v. Dallas Cnty. Hosp. Dist.*, 239 F. Supp. 2d 618, 639 (N.D. Tex. 2003) (noting that people living with HIV "must deal with the social stigma of being HIV-positive" and "will likely be treated as [] outcast[s] by many . . . ."), *aff'd*, 106 F. App'x 192 (5th Cir. 2003); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) ("An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information."). The Centers for Disease Control and Prevention caution health care workers to avoid revealing positive HIV test results even to family and friends of patients "[b]ecause of the risk of stigma and discrimination."[13] As the Court of Appeals observed, below,

One can readily envision circumstances in

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[12] Centers for Disease Control and Prevention, *Strategic Plan: Division of HIV/AIDS Prevention 2011 through 2015* (2011), *available at* http://www.cdc.gov/hiv/strategy/dhap/pdf/DHAP-strategic-plan.pdf.

[13] Centers for Disease Control and Prevention, *Revised Recommendations for HIV Testing of Adults, Adolescents, and Pregnant Women in Health-Care Settings*, Morbidity and Mortality Wkly. Rep. Recommendations and Reps., Sept. 22, 2006, at 10, *available at* http://www.cdc.gov/mmwr/PDF/rr/rr5514.pdf.

> which these types of injuries might flow from the disclosure of one's confidential medical records, which often contain some of the most sensitive and intimate information about one's physical, mental, and emotional well-being, and sexual orientation. Given the nature of the injuries that most frequently flow from privacy violations, it is difficult to see how Congress's stated goal of subjecting federal agencies to civil suit for *any damages* resulting from a willful or intentional violation of the Act could be fully realized unless the Act encompasses both pecuniary and nonpecuniary injuries.

Cooper, 622 F.3d at 1030.

Disclosure of a person's HIV status may have the above serious ramifications and, due to them, may adversely impact mental—and even physical—health in very serious although nonpecuniary ways. Exposure to HIV-related stigma is a significant source of psychological damage and depression. A 2006 study found that higher levels of HIV stigma experienced by those responding to the study directly correlated with having symptoms of depression and/or having received psychiatric care in the previous year.[14] Stigma also has been linked to delays by HIV-positive individuals in seeking testing and medical care,[15] and at least one recent study has

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[14] Vanable et al., *Impact of HIV-Related Stigma*, *supra* note 4, at 479-80.

[15] *See* Margaret A. Chesney & Ashley W. Smith, *Critical Delays In HIV Testing and Care: The Potential Role of Stigma*, 42 Am.

confirmed the relationship between stigma and treatment nonadherence.[16] Moreover, depressive symptoms among people with HIV consistently have been correlated with treatment nonadherence, suicidal thoughts, disease progression, and mortality.[17] Disturbingly, a 2004 study of nonmetropolitan people living with HIV found that "approximately 60% of participants reported moderate or severe levels of depressive symptomatology."[18]

For all of the above reasons and others, people with HIV suffer real—though often not pecuniary—harm when their HIV status is not kept private and confidential. *See, e.g., EEOC v. Ford Motor Credit Co.*, 531 F. Supp. 2d 930, 941 (M.D. Tenn. 2008) ("The plaintiff has alleged—and the defendant has admitted—that Mr. Doe suffered shame, embarrassment, and depression as a result of the disclosure of his HIV status to his coworkers. These are tangible injuries."). Under settled principles of construction, the Act's "actual damages" provision provides for a recovery when such harm is caused by

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Behav. Sci. 1162, 1163-1165, 1167-1169 (1999) (discussing research relating stigma to delays in seeking HIV testing and care).

[16] Vanable et al., *Impact of HIV-Related Stigma*, *supra* note 4, at 479-80.

[17] Timothy G. Heckman et al., *Emotional Distress in Nonmetropolitan Persons Living With HIV Disease Enrolled in a Telephone-Delivered, Coping Improvement Group Intervention*, 23 Health Psychol. 94, 97-98 (2004) (discussing studies with these findings).

[18] *Id.* at 97.

an intentional or willful violation of the Act. The experience of people with HIV powerfully demonstrates the importance for all individuals of having the Privacy Act applied as written and as intended, to protect against having federal agency employees make unauthorized disclosures of information from medical records kept by the agencies. To fail to apply the Act's "actual damages" provision to this case would be inconsistent with Congress's protective intent in enacting the Privacy Act.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Respondent, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

HAYLEY J. GORENBERG
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
120 Wall Street,
19th Floor
New York, NY 10005
(212) 809-8585
hgorenberg@lambdalegal.org
Counsel of Record

JON W. DAVIDSON
LAMBDA LEGAL
DEFENSE AND
EDUCATION FUND,
INC.
3325 Wilshire Boulevard,
Suite 1300
Los Angeles, CA 90010
(213) 382-7600

SCOTT A. SCHOETTES
LAMBDA LEGAL
DEFENSE AND
EDUCATION FUND,
INC.
11 East Adams,
Suite 1008
Chicago, IL 60603
(312) 663-4413

Attorneys for Amici Curiae

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FEDERAL AVIATION ADMINISTRATION, et al.,

Petitioners,

v.

STANMORE CAWTHON COOPER,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) IN SUPPORT OF THE RESPONDENT

MARC ROTENBERG
Counsel of Record
JOHN VERDI
ELECTRONIC PRIVACY
INFORMATION CENTER (EPIC)
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140

October 4, 2011

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INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C., which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values.[1] EPIC has participated as *amicus curiae* in several cases before this Court and other courts concerning the application of federal statutes that seek to protect privacy, including *FCC v. AT&T*, 131 S. Ct. 1177 (2011) (personal privacy exemptions in the Freedom of Information Act of 1966); *Doe v. Chao*, 540 U.S. 614 (2003) (Privacy Act of 1974); *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003) (personal privacy exemptions in the Freedom of Information Act of 1966); *Reno v. Condon*, 528 U.S. 141 (2000) (Drivers Privacy Protection Act of 1994); *Chicago Tribune v. University of Illinois*, No. 10-0568, 2011 WL 982531 (N.D. Ill. Mar. 7, 2011), *appeal docketed*, No. 11-2066 (7th Cir. Apr. 1, 2011) (Family Educational Rights and Privacy Act of 1974);

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[1] Letters of Consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. *Amicus* lodged with the Court Petitioners' and Respondent's letters of consent contemporaneous with the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party. EPIC Fellows Khaliah Barnes and Alan Butler contributed to the preparation of this brief.

United States v. Councilman, 385 F.3d 793 (1st Cir. 2004) (Electronic Communications Privacy Act of 1986); and *Harris v. Blockbuster Inc.*, 622 F. Supp. 2d 396 (N.D. Tex. 2009), *appeal docketed*, No. 09-10420 (5th Cir. Apr. 29, 2009) (Video Privacy Protection Act of 1988).

EPIC's Advisory Board includes leading scholars and technical experts concerned about the protection of privacy in the modern era.

EPIC routinely urges effective enforcement of privacy laws in the United States. Effective enforcement of privacy laws, such as the Privacy Act of 1974, requires full compensation for the broad range of harms associated with privacy violations. Because the general structure of privacy law and the specific text of the Privacy Act, and relevant legislative history, show that this is precisely what Congress intended, the Court should hold that actual damages include non-pecuniary harms arising from Privacy Act violations.

The Ninth Circuit Court's determination that the Privacy Act does not distinguish between pecuniary and non-pecuniary harms reflects the intent of Congress in the enactment of the privacy law.

SUMMARY OF THE ARGUMENT

At issue in this case is whether a plaintiff, whose sensitive medical information was willfully disclosed by a federal agency in violation of the Privacy Act of 1974, may recover damages for his mental and emotional distress.

The agency claims that mental and emotional distress do not constitute "actual damages" under the Act. However, mental and emotional damages are just the sort of harms for which privacy laws routinely provide compensation. And the Privacy Act's legislative history makes clear that Congress intended to include mental and emotional distress as one component of "actual damages."

Moreover, in establishing the obligations for the protection of personal information that are placed on federal agencies that collect and use personal information, Congress did not intend to allow agencies to sidestep statutory requirements by pointing to the non-pecuiniary character of harm suffered as a result of their own willful acts. Such an interpretation of the damages provision set out in the Act would undermine the statutory structure and lead agencies to be less careful in the protection of personal information within their control.

The civil remedy provision in the Privacy Act, like similar provisions in numerous privacy statutes, provides for the recovery of actual damages and includes a liquidated damages provision precisely because of the difficulty of measuring harm in privacy cases. Lawmakers have long incorporated such stipulated damages provisions in privacy statutes to ensure effective enforcement and to

safeguard personal information. Privacy laws routinely provide for recovery when a party demonstrates mental or emotional distress caused by a privacy violation, and more broadly when an agency has failed to uphold its obligations to protect the personal data within its care. Providing broad remedies is particularly important in privacy cases, where scholars and the courts have long recognized the difficulty in demonstrating pecuniary damages.

The legislative history of the Privacy Act, as well as a significant government report that provided the basis for the Act, make clear Congress's intent to provide meaningful remedies for violations of individuals' privacy rights and to ensure that federal agencies could not skirt their obligations to safeguard the personal information that they collect. Congress explicitly recognized the particular risks to privacy that could result from unlawful disclosures and thus included damages provisions that would enable the public to enforce the legal protections against wrongful disclosure. Congress intended "actual damages" to embrace the broad range of harms caused by privacy violations in order to deter and compensate for the unlawful disclosure of personal information.

ARGUMENT

I. Privacy Laws Routinely Provide for Recovery of a Broad Range of Damages, Including Mental And Emotional Distress

A. Privacy Laws Routinely Provide Compensation for Mental and Emotional Distress as a Component of Actual Damages

Privacy laws seek to impose obligations on those entities, public and private, that collect and use personal information and to create rights for individuals whose personal information is held by others. For example, the Privacy Act requires federal agencies to ensure accuracy, provide security and limit the use of the information to the purposes for which it was collected. Individuals are given the statutory right to inspect and correct information about them that is held by the agency. These provisions promote government transparency and accountability. They typify the foundational principles that animate much of privacy law in the United States – data collectors have legal obligations, and individuals have rights concerning their personal information.

When provided in privacy statutes, damages provisions do not simply provide compensation for harm suffered; they also aim to ensure compliance with statutory obligations by entities that collect and use personal data. To further that objective, the Privacy Act provides for recovery of "actual damages sustained by the individual as a result of the refusal or failure," by a federal agency to uphold its obligations under the Act. 5 U.S.C. § 552a(g)(4)

(2011). Those actual damages include harms suffered as a result of the privacy violation, which includes mental and emotional damages. When privacy laws provide for recovery of "actual damages," courts routinely award compensation for mental and emotional distress. These harms go to the core of what privacy statutes aim to protect – the non-pecuniary impacts of privacy violations.

Many different statutes protect the privacy of personal information. These statutes provide various civil remedies for privacy violations, including recovery for mental and emotional distress. Common law tort and constitutional remedies for privacy violations also allow recovery for mental and emotional distress. Many privacy statutes contain damage provisions similar to the Privacy Act, and courts routinely interpret these provisions as including mental and emotional distress. The Restatement (Second) of Torts also includes mental and emotional distress in its provision on damages for privacy violations. Courts have embraced the Restatement and regularly grant recovery of mental and emotional damages in privacy cases.

The Fair Credit Reporting Act ("FCRA") sets guidelines for consumer reporting agencies that collect and sell access to data about individuals' creditworthiness. 15 U.S.C. § 1681b (2011). The FCRA permits recovery of damages for mental and emotional distress caused by violations of the Act. In *Cortez v. Trans Union, LLC* the Third Circuit held:

> In allowing suits for damages, Congress certainly intended to allow compensation for the very kind of harm that the FCRA was intended to prevent. This is not legislation mandating a

> safety standard to prevent physical injury. It is legislation designed to facilitate banking and the extension of credit while protecting consumers from the kind of injury that will almost certainly result when erroneous information is inserted into a credit report. Thus, damages for violations of the FCRA allow recovery for humiliation and embarrassment or mental distress even if the plaintiff has suffered no out-of-pocket losses.

Cortez v. Trans Union, LLC, 617 F.3d 688, 719 (3d Cir. 2010); *see also Bryant v. TRW*, 689 F.2d 72, 77 (6th Cir. 1982).

The Fair Debt Collection Practices Act ("FDCPA") protects the privacy of alleged debtors by limiting communications made by debt collectors. 15 U.S.C. § 1692C (2011). The FDCPA imposes civil liability on "any debt collector who fails to comply" with its provisions, including "any actual damages sustained." 15 U.S.C. § 1692C(a) (2011). Mental and emotional distress are compensable damages under the FDCPA's "actual damages" provision. For example, individuals' stress resulting from false threats of suit has been recognized as a compensable injury in private suits under the FDCPA. *E.g., United States v. Nat'l Fin. Services*, 98 F.3d 131, 140 (4th Cir. 1996); *Carrigan v. Central Adjustment Bureau*, 502 F.Supp. 468 (N.D. Ga. 1980); *Nelson v. Equifax Info. Services*, 522 F. Supp. 2d 1222, 1235 (C.D. Cal. 2007); *McGrady v. Nissan Motor Acceptance*, 40 F. Supp. 2d 1323, 1338 (M.D. Ala. 1998).

The federal wiretap act, as amended by the Electronic Communications Privacy Act of 1986

("ECPA"), prohibits the interception and disclosure of wire, oral, and electronic communications. 18 U.S.C. § 2511 (2011). The Act provides statutory damages for violations of the Act. 18 U.S.C. § 2520(c)(1)(A); 18 U.S.C. § 2520(c)(1)(B); 18 U.S.C. § 2520(c)(2)(B); 18 U.S.C. § 2707(c). The United States Court of Appeals for the D.C. Circuit interpreted an earlier version of ECPA to permit collection of damages for mental and emotional distress. *Halperin v. Kissinger*, 606 F.2d 1192, 1207-08 (D.C. Cir. 1979) *aff'd in part, cert. dismissed in part*, 452 U.S. 713, 101 S. Ct. 3132, 69 L. Ed. 2d 367 (1981) (holding that violations of the federal wiretap act that cause emotional distress and mental anguish entitle plaintiffs to recovery).

The Equal Credit Opportunity Act ("ECOA") bars creditors from discriminating against applicants on the basis of color, race, sex, national original, marital status, age, or the fact that an applicant's income derives from a public assistance program. 15 U.S.C. § 1691 (2011). The ECOA provides for statutory damages sustained as a violation of the Act. Courts consistently interpret the Act's statutory damages provision to be triggered by mental and emotional distress. *E.g. Fischl v. Gen. Motors Acceptance*, 708 F.2d 143, 148 (5th Cir. 1983); *Anderson v. United Finance,* 666 F.2d 1274 (9th Cir. 1982); *Smith v. Anchor Building*, 536 F.2d 231, 236 (8th Cir. 1976); *Williams v. Matthews*, 499 F.2d 819, 829 (8th Cir. 1974), *cert. denied* 419 U.S. 1021, 1027, 95 S.Ct. 495, 42 L.Ed.2d 294; *Jeanty v. McKey & Poague*, 496 F.2d 1119, 1121 (7th Cir. 1974); *Seaton v. Sky Realty*, 491 F.2d 634, 636 (7th Cir. 1974); *Steele v. Title Realty*, 478 F.2d 380, 384 (10th Cir. 1973).

The Employee Polygraph Protection Act ("EPPA") prohibits employers from discharging, disciplining, or

discriminating against employees based upon lie detector test results. 29 U.S.C. § 2002 (2011). Employees may collect statutory damages for violations of the Act. 29 U.S.C. § 2005 (2011). Courts routinely award statutory damages for EPPA violations that cause mental and emotional distress. *E.g. Dilworth v. LaSalle-Chicago 24-Hour Currency Exchange,,* No. 02-7543, 2004 WL 524665 (N.D. Ill. March 12, 2004) (jury awarded plaintiff $6,000); *Albin v. Cosmetics Plus, N.Y.,* No. 97-2670, 2001 WL 15676 (S.D.N.Y. Jan. 5, 2001) (jury awarded plaintiff $75,000 in lost wages and $5,000 for emotional distress; court upheld award and granted plaintiff's request for prejudgment interest on the lost wages award, calculated at a 6% rate); *Mennen v. Easter Stores,* 951 F.Supp. 838 (N.D. Iowa 1997) (court awarded plaintiff $18,225.35 in lost wages, $4,098.22 in prejudgment interest on lost wages award, and $15,000 for emotional distress); *Jones v. Confidential Investigative Consultants,* No. 92-1566, 1994 WL 127261 (N.D. Ill. April 12, 1994) (jury awarded plaintiff $90,000; court declared judgment to be void because it was obtained in violation of Bankruptcy Code's automatic stay)." *Lyles v. Flagship Resort,* 371 F. Supp. 2d 597, 604-05 (D.N.J. 2005).

The Internal Revenue Code prohibits the disclosure of taxpayer return information under certain circumstances. 26 U.S.C. §6103 (2010). A taxpayer whose return is disclosed in violation of Section 6103 or Section 6104(c) can bring an action for civil damages. These damages include:

> (1) the greater of--
>
> (A) $1,000 for each act of unauthorized inspection or disclosure of a return or return

> information with respect to which such defendant is found liable, or
>
> (B) the sum of--
>
> (i) the actual damages sustained by the plaintiff as a result of such unauthorized inspection or disclosure, plus
>
> (ii) in the case of a willful inspection or disclosure or an inspection or disclosure which is the result of gross negligence, punitive damages...

15 U.S.C. §7431 (2010). The "actual damages" described in this section include damages for mental and emotional distress, *Hrubec v. Nat'l R.R. Passenger Corp.*, 829 F. Supp. 1502, 1506 (N.D. Ill. 1993) ("As with the right to privacy generally, when violated, the outstanding damage is mental and/or emotional distress."), even in cases against the United States. *Ward v. United States,* 973 F. Supp. 996 (D. Colo. 1997) (holding that taxpayer was entitled to damages for mental distress).

The Restatement (Second) of Torts makes clear that "[o]ne who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other." Restatement (Second) of Torts §652A(1) (1977). When a plaintiff's right of privacy has been invaded, the Restatement provides that they can recover for (1) "harm to [their] interest," (2) "mental distress ... suffered," and (3) "special damage." Restatement (Second) of Torts §652H. Courts frequently award damages for mental and emotional distress in privacy tort cases. *See, e.g., Braun v. Flynt*, 726 F.2d 245, 250-51 (5th Cir. 1984) ("an invasion of privacy claim is founded on mental anguish, under Texas law"); *Davis v. Creditors Interchange Receivable Mgmt., LLC*, 585 F. Supp. 2d

968, 977 (N.D. Ohio 2008) ("The tort of invasion of privacy is designed to compensate the victim for mental suffering, shame, or humiliation.") (*citation omitted*); *Staruski v. Continental Telephone Co. of Vermont,* 154 Vt. 568, 574, 581 A.2d 266, 269 (Vt.1990) (damages for invasion of privacy are recoverable as stated in § 652H "even if the injury suffered is mental anguish alone."); *Huskey v. Nat'l Broad. Co., Inc.*, 632 F. Supp. 1282, 1293 (N.D. Ill. 1986) ("By their very nature, contracts not to invade privacy are contracts whose breach may reasonably be expected to cause emotional disturbance."); *LeCrone v. Ohio Bell Telephone Co.*, 120 Ohio App. 129, 131 (1963) (invasion of privacy protects "primarily a mental [interest] rather than an economic or pecuniary interest.").

Courts have held that mental and emotional distress damages are particularly important in privacy cases where a plaintiff's HIV status was revealed. *Nolley v. County of Erie*, 802 F. Supp. 898, 904-05 (W.D.N.Y. 1992) (granting damages to an inmate whose HIV status was revealed as a result of a county holding center policy: "Unwarranted release of this information is virtually certain to cause some injury, yet be the type of injury that is very difficult to prove. It is also likely to cause mental distress"). These damages compensate and deter disclosure of sensitive, reputation threatening, medical information in the much the same way as *per se* defamation cases. *See Nolley*, at 903 (citing *The Right to Privacy, supra*, at 219); *Hamilton v. Lumbermen's Mut. Cas. Co.*, 82 So. 2d 61 (La. Ct. App. 1955) (citing *The Right to Privacy, supra*, at 219).

B. Privacy Laws Routinely Provide for Recovery of a Wide Range of Damages to Ensure that a Meaningful Remedy Is Available for the Wrongful Disclosure of Private Information

Privacy laws seek to impose a set of obligations on those entities, public and private, that collect and use personal information and to create rights for individuals whose personal information is held by others. In these statutory schemes, the damage provisions do not simply provide compensation for harm suffered; they ensure that the full range of obligations are upheld by entities that collect and use personal data. To further that objective, privacy statutes routinely provide for recovery of a wide range of damages, including liquidated damages. Liquidated damage provisions recognize the broad range of harms caused when a privacy right is violated and acknowledge the inherent difficulty in proving pecuniary harms when a privacy law is violated. Liquidated damages also offer a meaningful remedy when the actual harms suffered might be difficult to quantify, but are nonetheless serious. It is consistent with the use of these damage provisions in privacy laws to recognize both pecuniary and non-pecuniary harms.

Privacy laws contain liquidated damages provisions precisely because violations of an individual's privacy are uniquely difficult to quantify. A price cannot be placed on humiliation, mental suffering, or any other ills arising from violations of an individual's privacy. This Court has held "liquidated damages serve a particular useful

function when damages are uncertain in nature or amount or are unmeasurable." *Rex Trailer Co. v. United States*, 350 U.S. 148, 153 (1956) (internal quotation and citation omitted). Damages arising from privacy violations are "quintessential example[s] of damages that are uncertain and possibly unmeasurable." *Kehoe v. Fidelity Federal Bank & Trust*, 421 F.3d 1209, 1213 (11th Cir. 2005).

The Privacy Act of 1974 provides for recovery of "actual damages sustained by the individual as a result of the refusal or failure," in addition to attorney's fees. 5 U.S.C. § 552a(g)(4) (2011). The Stored Communications Act ("SCA") prohibits the unauthorized access to electronic communications services and provides for recovery of actual and liquidated damages "[in] the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000." 18 U.S.C. § 2707(c) (2011).

The Electronic Communications Privacy Act of 1986 ("ECPA"), an omnibus communications privacy law, which sets out a broad range of obligations for companies that collect and use personal information for the provision of communications services also contains numerous provisions establishing liquidated damages. For example, the Act bars illegal interception of electronic communications and states "if the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or

statutory damages of not less than $50 and no more than $500." 18 U.S.C. § 2520(c)(1)(A) (2011). Another ECPA section provides for statutory damages of no less than $100 and no more than $1,000 to victims who have had their privacy violated under ECPA on previous occasions. 18 U.S.C. § 2520(c)(1)(B) (2011). For more than two violations of ECPA, the penalties are as follows:

> [I]n any other action under this section, the court may assess as damages whichever is the greater of (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

18 U.S.C. § 2520(c)(2)(B) (2011). ECPA bars unlawful access to stored communications. The Act provides for recovery of a plaintiff's actual damages and disgorgement of profits from a violator, "but in no case shall a person entitled to recover receive less than the sum of $1,000." 18 U.S.C. § 2707(c) (2011).

Both the Drivers Privacy Protection Act ("DPPA") and the Video Privacy Protection Act ("VPPA") provide for court awards of "actual damages, but not less than liquidated damages in the amount of $2,500." 18 U.S.C. § 2724 (b)(1)(a) (2011); 18 U.S.C. §2710 (c)(2)(A) (2011). The Telephone Consumer Protection Act ("TCPA") provides for liquidated damages. 47 U.S.C. § 227(b)(3)(B) (2011). The Act protects individuals from receiving repeated telemarketing calls, and individuals are entitled "to recover for actual monetary loss from such a

violation, or to receive up to $500 in damages for each such violation, whichever is greater." *Id.*

The Cable Communications Policy Act ("CPPA"), protects the privacy of cable televisions subscribers and provides for liquidated damages. 47 U.S.C. § 551(f)(2)(A) (2011). The Act provides for "actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher." *Id.* The Right to Financial Privacy Act of 1974 ("RFPA"), which was enacted the same year as the Privacy Act of 1974, permits plaintiffs to recover $100 per RFPA violation to ensure enforcement of the obligations contained in the Act. 12 U.S.C. § 3417 (a)(1) (2011). The Fair Credit Reporting Act ("FCRA") provides for the recovery of statutory damages.

Non-pecuniary harms resulting from privacy violations typically entitle victims to recover actual and liquidated damages. The Privacy Act's provision of actual damages is consistent with lawmakers' routine practice of providing broad remedies for privacy violations.

II. There is a Consensus Amongst Legal Experts that Privacy Laws Should Deter Violations of Privacy Interests by Recognizing a Broad Range of Privacy Harms

The Privacy Act of 1974, 5 U.S.C. § 552a (2010), and other privacy laws seek to protect individuals from suffering violations of privacy rights. These laws typically provide civil remedies to ensure private enforcement of privacy violations by the government or other third parties. The cornerstone

of the modern understanding of "privacy" in American law is the 1890 article by Samuel D. Warren and Louis D. Brandeis. The article begins:

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.

Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). Warren and Brandies make clear that mental and emotional distress are just as real, and compensation for the distress just as necessary, as any economic or bodily injury:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Id. at 219.

As one of the current Justices once wrote:

> The traditional western conception of man has laid great emphasis on the worth of the individual; if this image is to be retained, if we are not to move beyond

> freedom and dignity, privacy must be vigilantly safeguarded.

SAMUEL ALITO, THE BOUNDARIES OF PRIVACY IN AMERICA 1 (1972) ("Report of the Chairman") (on file with *amici*).

Privacy laws typically regulate conduct that is likely to cause mental and emotional distress. Frederick Lodge, *Damages Under the Privacy Act of 1974: Compensation and Deterrence*, 52 FORDHAM L. REV. 611 (1984) ("a restrictive view of actual damages, limiting such damages to pecuniary loss, would render the remedial provisions of the Act ineffective by excluding the type of damages most likely to occur from the recovery available under the Act"). Warren and Brandeis understood that privacy laws are critical in deterring privacy violations that cause mental and emotional distress. *The Right to Privacy*, *supra* at 219 ("even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.") Tort law has long provided remedies for intangible harms, such as those resulting from defamatory statements or torts against dignity. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1283 (1976).

The damages recognized by the Privacy Act are broader and more important than simple pecuniary loss. The Privacy Act "requires agencies to take precautions to avoid causing 'substantial harm, embarrassment, inconvenience, or unfairness to any individual' who is the subject of a record." Lodge, *supra* at 621 (citing 5 U.S.C. §522a(e)(10)). In order to vindicate privacy violations, laws such as the Privacy Act, 5 U.S.C. §522a, must compensate for more than just pecuniary losses. In 1968 Professor,

and later Solicitor General, Charles Fried set out a powerful articulation of this right. He wrote, "privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust." Charles Fried, *Privacy*, 77 YALE L.J. 475-93 (1968), reprinted in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 203, 205 (ed. Ferdinand D. Schoeman 1984). He concludes:

> The concept of privacy requires, as we have seen, a sense of control and a justified acknowledged power to control aspects of one's environment . . . A legal right to control is control which is the least open to question and argument; it is the kind of control we are most serious about. As we have seen, privacy is not just an absence of information abroad about ourselves; it is a feeling of security in control over that information. By using the public, impersonal and ultimate institution of law to grant persons this control, we at once put the right to control as far beyond question as we can and at the same time show how seriously we take this right.

Id. at 219.

Privacy laws, such as the federal Privacy Act of 1974, seek to restore this control and the damage award is the means by which the "justified acknowledged power," in Professor Fried's phrase, is realized.

More recently, Professor Jerry Kang, a prominent legal scholar, has described the core human interests

underlying the right to privacy. First, privacy helps individuals avoid the embarrassment that accompanies the disclosure of certain personal details. Second, privacy helps to preserve human dignity, respect, and autonomy. Finally, privacy helps individuals construct intimacy with others. Jerry Kang, *Info. Privacy in Cyberspace Transactions,* 50 STAN. L. REV. 1193, 1212–16, 1260 (1998). Prominent privacy scholars have elaborated upon each of these purposes in order to "identify and animate the compelling ways that privacy violations can negatively impact the lives of living, breathing human beings," as Professor Ann Bartow put it:

> The embarrassment that results from privacy incursions is uniquely detrimental to humans, with irreparable effects on individuals.

Ann Bartow, *A Feeling of Unease About Privacy Law,* 155 U. PA. L. REV. 52 (2007). As Professor Julie E. Cohen has written:

> The point [of privacy regulation] is not that people will not learn under conditions of no-privacy, but that they will learn differently, and that the experience of being watched will constrain, ex ante, the acceptable spectrum of belief and behavior.

Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object,* 52 STAN. L. REV. 1373, 1425 (2000). Professor Cohen cites cognitive psychology research to demonstrate that embarrassment stunts social development and growth, neither of which is fungible or replaceable in human beings. *Id.* at 1425, n.195. Professor Jeffrey Rosen also observes: "knowledge of private

information poses special threats to individuals' ability to structure their lives in unconventional ways." Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2121 (2001). Professor Helen Nissenbaum does as well:

> [I]nsofar as privacy, understood as a constraint on access to people through information, frees us from the stultifying effects of scrutiny and approbation (or disapprobation), it contributes to material conditions for the development and exercise of autonomy and freedom in thought and action.

HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 82 (2010).

Professor Anita Allen-Castellitto expands further on the value of privacy protections, demonstrating that limiting the disclosure of embarrassing personal information strengthens the individual's capacity to experiment and comply with cross-cutting social roles, both in public and behind closed doors:

> Privacy has value as the context in which individuals work to make themselves better equipped for their familial, professional, and political roles. With privacy, I can try to become competent to perform and achieve up to my capacities, as well as to try out new ideas and practice developing skills.

Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 739-40 (1999).

A second set of interests underlying the right to privacy are interconnected: dignity, respect, and autonomy. Professor Francesca Bignami urges that "[e]ven in a world in which, thanks to technology, acquiring knowledge about others is virtually effortless, personal autonomy must be respected." Francesca Bignami, *The Case for Tolerant Constitutional Patriotism: The Right to Privacy Before the European Courts*, 41 CORNELL INT'L L.J. 211, 223 (2008). Professor Rosen explains how the term applies to privacy law: "autonomy concerns the individuals' ability to maintain a sphere of immunity from social norms and regulations." Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2121 (2001). As Professor Nissenbaum has written:

> [E]ven when we are uncertain whether or not we are being watched, we must act as if we are. When this happens, when we have internalized the gaze of the watchers and see ourselves through their eyes, we are acting according to their principles and not ones that are truly our own.

HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 82 (2010). Professor Gary T. Marx has written:

> When the self can be technologically invaded without permission and even often without the knowledge of the person, dignity and liberty are diminished. Respect for the individual involves not causing harm, treating persons fairly through the use of universalistically applied valid

> measures, offering meaningful choices and avoiding manipulation and coercion. These in turn depend on being adequately informed.

GARY T. MARX, MURKY CONCEPTUAL WATERS: THE PUBLIC AND THE PRIVATE (2001).[2] Former OECD Official and Director of the Harvard Information Infrastructure Project Deborah Hurley adds that:

> Protection of privacy and personal data are important because they go profoundly to our sense of self, individual integrity, and autonomy and to our ability to express ourselves, to communicate with others, and to participate in the collective, all deep human needs.

Deborah Hurley, *A Whole World in One Glance: Privacy as a Key Enabler of Individual Participation in Democratic Governance*, 1 INT'L J. OF INTERNET TECH. AND SEC. TRANS. 2 (2007).

Finally, privacy law scholars highlight human beings' special relationship with the intimate details of their personal lives, which the right to privacy protects. Professor Allen has written that privacy is an essential precursor to "intimate relationships on which workable family and community life depend." Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 739 (1999). Professor Rosen explains:

> If individuals cannot form relationships of trust without fear that their

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[2] Available at http://web.mit.edu/gtmarx/www/murkypublicandprivate.html.

> confidences will be betrayed, the uncertainty about whether or not their most intimate moments are being recorded for future exposure will make intimacy impossible; and without intimacy, there will be no opportunity to develop the autonomous, inner-directed self that defies social expectations rather than conforms to them.

The Purposes of Privacy: A Response, 89 Geo. L.J. 2117, 2123-24 (2001). Professor Nissenbaum expands this point:

> There are two sides to this coin: our closest relationships of love and friendship are defined by our willingness to share information, yet we signal our trust in and respect for others by not insisting that they relinquish control over information to us.

HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 84 (2010).

Though the actual damage caused by a privacy violation may be difficult to quantify, privacy statutes routinely include broad damage provisions in order to compensate and vindicate the victim's right. Professor Allen writes that statutory privacy protections are intended to remedy "damage[d] feelings and sensibilities" rather than mere pecuniary injuries. ANITA L. ALLEN, PRIVACY LAW AND SOCIETY 113 (2007).

While the statutory language providing for damages varies by statute, there is no significant difference in the purpose. As Justice Scalia wrote in

concurrence in *Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Services*:

> [I]t would be no more rational to reject the normal meaning of 'prevailing party' because some statutes produce the same result with different language, than it would be to conclude that, since there are many synonyms for the word 'jump,' the word 'jump' must mean something else.

532 U.S. 589, 614-15 (2001) (Scalia, J., concurring). Where there is an intentional violation of a privacy statute, awards of mental and emotional damages ensure compensation for the victim and deter future violations. Compensation and deterrence are the two main goals of the civil remedies provided in section 552A of the Privacy Act. Frederick Lodge, *Damages Under the Privacy Act of 1974: Compensation and Deterrence*, 52 FORDHAM L. REV. 611, 619 (1984).

III. Legislative Materials Relevant to the Privacy Act Demonstrate That Congress Contemplated Remedying Non-pecuniary Harms With the Privacy Act

The history of the Privacy Act indicates a clear intent to establish a remedy scheme that would ensure compliance with the Act's mandate and provide broad relief. The federal advisory committee report that preceded the Act put forth a full range of damage provisions, including liquidated damages, actual damages, and punitive damages. These recommendations were reflected in the House and Senate bills, the final text of the Act, as well as the OMB Guidelines that followed passage.

A. The HEW Advisory Committee Report of 1973

The Privacy Act of 1974 was enacted out of a growing concern for the rights of citizens in the face of advancing technology. The Act was the legislative culmination of extensive academic research that revealed the many threats to individual privacy and autonomy in the wake of increasingly powerful computer databases. One of the most influential studies to which the Congress looked when drafting the Privacy Act was the 1973 report *Records, Computers, and the Rights of Citizens*, prepared for the Department of Health, Education and Welfare ("HEW Report"). The federal advisory committee that produced the report sought to determine the limitations that should be placed on the application of computer technology to record keeping about citizens. *Id.* at 33. The advisory committee foresaw that sensitive or personal information could be compromised when compiled into vast databases that lacked regulatory oversight. *Id.* at 28. Ultimately, the HEW Report outlined a series of recommendations that became the basis of the Privacy Act of 1974.

To address the lack of privacy protections in automated record keeping systems, the HEW Report recommended the enactment of legislation establishing a Code of Fair Information Practices that would govern all automated personal data systems. *Id.* at 50. The Code articulated basic informational privacy principles, and allocated rights and responsibilities in the collection and use of personal information. *Id.* The Code of Fair Information Practices proposed by the HEW Report provides:

- There must be no personal-data record-keeping systems whose very existence is secret.
- There must be a way for an individual to find out what information about him is in a record and how it is used.
- There must be a way for an individual to prevent information obtained about him for one purpose from being used or made available for other purposes without his consent.
- There must be a way for an individual to correct or amend a record of identifiable information about him.
- Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take reasonable precautions to prevent misuse of the data.

Id. at 41.

These highly influential principles formed the basis of the Privacy Act of 1974 and many privacy laws since. R. Turn and W.H. Ware, *Privacy and Security Issues in Information Systems*, in ETHICAL ISSUES IN THE USE OF COMPUTERS 133, 138 (Deborah G. Johnson & John W. Snapper eds. 1985). See also Robert Gellman, *Does Privacy Law Work?* in TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE 193, 196 (Philip E. Agre & Marc Rotenberg, eds.) ("The articulation of principles of fair information practices may be the computer age's most significant policy development with respect to privacy.").

Of particular concern to the advisory committee was its recommended strong legal remedies for privacy violations. HEW Report at 36. "Unless injury to the individual can be translated into reasonably substantial claims for damages, the individual ordinarily has little incentive to undertake a lawsuit. Few people can afford to bring suit against a well-defended organization solely for moral satisfaction." *Id.* The advisory committee recommended "the enactment of legislation establishing a Code of Fair Information Practices for all automated personal data systems." *Id.* at 50. Regarding violations of the Act, the HEW Report said:

> The Code should give individuals the right to bring suits for unfair information practices to recover actual, liquidated, and punitive damages, in individual and class actions. It should also provide for recovery of reasonable attorney's fees and other costs of litigation incurred by individuals who bring successful suits.

Id. The Privacy Act, enacted a year after the HEW Report was released, implemented many of the advisory committee's recommendations, including a broad and effective damages provision for violations of the Act.

B. Legislative History of the Privacy Act of 1974

The civil remedy provision in the Privacy Act was the result of a series of amendments to and compromises between the Senate bill, S. 3148, and the House bill, H.R. 16,373. Early versions of the bills imposed "actual" as well as "punitive" and

"liquidated" damages for certain violations. The eventual compromise retained the "actual damages" provision (with a statutory minimum of $1,000), where the violation is "intentional or willful," but not a "punitive damages" provision. The Congressional debates reinforced this distinction between punitive and liquidated damages, which would be available without specific proof of injury, and actual damages. *E.g.*, House Comm. on Gov't Operations and Senate Comm. on Gov't Operations, 94th Cong., 2d Sess., *Legislative History of the Privacy Act of 1974 -- S. 3418 (Pub. L. No. 93-579)*, 886-87 (1976) (hereinafter *Legislative History*) (Rep. Abzug) (discussing assessments of "actual damages" in contrast to "punitive damages").[3]

The original Senate bill, S. 3418, introduced in the Senate Committee on Government Operations, provided for both actual and punitive damages for any violation of the Privacy Act. S. 3418, 93d Cong. §304(b) (1974), *reprinted in* Legislative History at 27. The parallel House bill, H.R. 16373, originally provided for actual damages in all cases, with additional punitive damages if the violation was "willful, arbitrary, or capricious." H.R. 16373, 93d Cong. §304(b) (1974), *reprinted in* Legislative History at 250-51. From the outset, Congress recognized that violations of an individual's privacy required compensation beyond pecuniary, out-of-pocket expenses.

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[3] *Available at at http://www.loc.gov/rr/frd/Military_Law/pdf/LH_privacy_act-1974.pdf*

The House Committee on Government Operations reported out H.R. 1673 on September 24, but removed the provision on punitive damages. Representatives Abzug, Moss, Stanton, Gude, Burton, Fascell, Culver, Collins, Rosenthal, and Conyers expressed concern about the absence of punitive damages, proposed in the House measure, since "[a]ctual damages resulting from an agency's misconduct will, in most cases, be difficult to prove and this will often preclude an adequate remedy at law." Legislative History at 330. The representatives considered the inclusion of punitive damages, "or, at the very least, liquidated damages," to be "essential." *Id.* And there is no indication that the Congressional debates sought to distinguish between pecuniary and non-pecuniary losses

Representative Fascell unsuccessfully offered an amendment to essentially restore the original damages language of H.R. 16373. *Id.* at 919. This amendment would have made actual damages available for all violations of the Privacy Act, with punitive damages for willful, arbitrary, or capricious violations. *Id.* at 919-20. Representative McCloskey opposed this amendment. He was concerned about subjecting the United States to potentially limitless punitive damages. *Id.* at 922. But he did not suggest that the solution would be to exclude recovery for non-pecuniary harms. Representative Eckhardt pointed out that in the absence of the Fascell amendment, a person who had suffered any amount of actual damage because of the negligence of an agency would be unable to recover. *Id.* The Fascell amendment was ultimately rejected, as it was identical to language rejected by the committee below. *Id.* at 924. After additional debate, the bill was passed by the House. *Id.* at 983.

That same day, the Senate considered S. 3418 as reported out by the Committee on Government Operations. *Id.* at 763. The Committee offered several amendments to the bill, which at the time allowed a plaintiff to sue the individual agent responsible for the Privacy Act violation. *Id.* at 768. Instead, the Committee recommended that only the agency be liable, and that the plaintiff should be able to recover both actual and general damages, with a provision for liquidated damages "of say $1,000." *Id.* The bill was thus passed providing for actual and general damages, but not punitive or liquidated damages removed from any injury or harm. *Id.* The debate over punitive damages was a major point of contention, but it was never disputed that provable, compensable harms caused by a willful government violation were sufficient under (g)(4).

C. The OMB Guidelines of 1975

In 1975, the OMB issued authoritative regulations for agencies implementing the Privacy Act, pursuant to section 6 of the Privacy Act that also gives the OMB continuing powers to oversee agencies' implementation of the Act. Pub. L. 93-579, §6. Office of Management and Budget, Guidelines for Implementing Section 552a of Title 5 of the United States Code, (1975) ("OMB Guidelines"), reprinted in Legislative History at 1015. Among other things, the OMB Guidelines explicate the requirements for civil remedies available to plaintiffs under subsection (g)(1). OMB Guidelines at 76.

The OMB Guidelines enumerate three requirements for an individual to sue under subsection (g)(1)(D): it "must be shown" that the action was "intentional or willful"; there was "an injury or harm to the individual"; and the "injury was

causally related to that alleged agency failure." *Id.* at 76. This excerpt indicates the OMB's interpretation of the phrase "actual damage" in 5 U.S.C. §552a(g)(4)(A) as an "injury or harm" that is "causally related" to the agency failure. There is no indication that the type of "injury" shown cannot be mental and emotional in nature.

Congress explicitly delegated to the OMB the task of developing guidelines for the application of the Privacy Act. 5 U.S.C. § 552a(v). The OMB Guidelines clearly indicate that "actual damages" require a showing of injury or harm causally related to the agency failure, but not an injury narrowly defined as pecuniary. OMB Guidelines at 76-67. Since the OMB Guidelines are a reasonable interpretation of a statute that the OMB was charged with overseeing, the court should defer to the agency's interpretation of the statute. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

CONCLUSION

Amicus respectfully asks this Court to deny Petitioners' motion and uphold the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

MARC ROTENBERG
JOHN VERDI
ELECTRONIC PRIVACY
INFORMATION
CENTER (EPIC)
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140

October 4, 2011

AMICUS CURIAE BRIEF

No. 10-1024

In the SUPREME COURT OF THE UNITED STATES

FEDERAL AVIATION ADMINISTRATION, ET AL.,
Petitioners
v.
STANMORE CAWTHON COOPER,
Respondent.

On Writ Of Certiorari to the United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF THE RESPONDENT

DAVID K. COLAPINTO
Counsel of Record
STEPHEN M. KOHN
NATIONAL WHISTLEBLOWER LEGAL DEFENSE AND EDUCATION FUND
3238 P Street, NW
Washington, DC 20007
(202) 342-6980
dc@whistleblowers.org
Counsel for Amicus Curiae National Whistleblower Center

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STATEMENT OF INTEREST OF THE NATIONAL WHISTLEBLOWER CENTER[1]

The National Whistleblower Center (Center) is a nonprofit, tax-exempt, non-partisan, charitable, and educational organization dedicated to the protection of employees who "blow the whistle" and report misconduct in the workplace. In both the public and private sector, the Center assists employees who have suffered retaliation due to reporting violations of law or disclosing matters in the interest of public health and safety. The Center aids employee whistleblowers who have been involved in environmental protection, nuclear safety, government accountability, and the advocacy of important public policy.

In addition to its involvement in whistleblower litigation, the Center remains active in the education and advocacy of whistleblower protection. The Center sponsors and participates in public education programs and training seminars throughout the country. Furthermore, the Center operates an Attorney Referral Service for whistleblowers (with attorney members in 36 states) and maintains an in-depth and informative Internet web site at www.whistleblowers.org. Since 1990, the Center has participated before this Court as *amicus curiae* in a number of cases that directly impact the rights of

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[1] Pursuant to Rule 37.6, the Center states that no monetary contributions were accepted for the preparation or submission of this *amicus curiae* brief and that its counsel authored this brief in its entirety. Counsel for all parties have consented to the filing of an *amici curiae* brief by the Center.

whistleblowers, including, *English v. General Electric*, 496 U.S. 72 (1990); *Haddle v. Garrison*, 525 U.S. 121 (1999); *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), and *Doe v. Chao*, 540 U.S. 614 (2004).

Persons assisted by the Center have a direct interest in the outcome of this case. The Privacy Act is a key piece of legislation to ensure that the privacy rights of citizens are protected. Whistleblowers who report wrongdoing by Federal agencies and government officials frequently are subject to violations of privacy. It cannot be over-stated how vital avenues of legal redress, including rights available under the Privacy Act, are to those courageous employee-whistleblowers, both actual and potential, who put the public good before their own careers and who face violations of their privacy as a result of taking unpopular positions. Protecting the privacy of these individuals is an essential component in encouraging employees to reveal severe abuses of power and dangerous industrial practices. It is surely an incontrovertible fact that, even under the best of circumstances, whistleblowers run enormous risks and suffer retaliation for reporting wrongdoing. If the Privacy Act does not provide remedies for actual non-pecuniary harms (such as for emotional distress and humiliation), then whistleblowers face even greater disincentives to expose misconduct or violations of law.

SUMMARY OF THE ARGUMENT

In order to combat the widespread government abuse of power and misuse of personal information that existed in the years preceding 1974, Congress created a remedy through the Privacy Act to compensate individuals who fell victim to such "intentional or willful" governmental abuses and deprivation of personal privacy rights. Congress intended to encourage the widest possible citizen enforcement of civil remedies to effectuate the legislative purposes for passing the Privacy Act. The doctrine of sovereign immunity or other cannons of statutory construction do not limit the reach of "actual damages" to preclude recovery of non-pecuniary compensatory damages that are actually incurred when the Privacy Act is violated.

In the preamble to the Act, Congress expressly required all Federal agencies to be subject to suit for "any damages" resulting from "intentional or willful" violations of the Privacy Act. Congress also expressly stated, *inter alia,* in the Act's preamble that the "right to privacy is a personal and fundamental right protected by the Constitution." Permitting recovery of non-pecuniary damages is necessary to effectuate the stated congressional purpose to provide for recovery of "any damages" for violations of these personal and fundamental rights, because victims whose privacy has been violated most commonly suffer non-pecuniary harm in the form of mental anguish, humiliation and reputational harm, which is actually incurred and well documented. Whistleblowers, like other Privacy

Act plaintiffs, actually suffer emotional distress or embarrassment as a direct result of intentional or willful Privacy Act violations committed by Federal agencies.

To prevent such further widespread abuses by the Federal government Congress enacted the Privacy Act damages provision to permit the recovery of damages actually incurred when they suffer an "adverse effect" resulting from a "willful or intentional" violation of the Act.

Congress expressly waived sovereign immunity to provide for the recovery of any damages actually resulting from such violations. Congress did not delegate to the Privacy Protection Commission its authority to define the term "actual damages" in the Privacy Act or to decide whether the Act provides for the recovery of non-pecuniary compensatory damages. The Commission's recommendations were flawed and never acted upon or adopted by Congress. Additionally, this Court owes no deference to the Commission. Rather, when the Privacy Act was enacted in 1974, Congress was fully aware that the term "actual damages" included recovery for non-pecuniary compensatory damages and the text of the statute makes clear the intent to provide for recovery of damages that are actually incurred as a result of intentional or willful violations. To construe the statute narrowly, and to limit damages to out of pocket losses, not only conflicts with Act's stated legislative purpose, but it would also eviscerate the Act's remedial purpose and leave victims of intentional or willful violations without a remedy.

ARGUMENT

I. DENYING RECOVERY OF EMOTIONAL DISTRESS DAMAGES ACTUALLY INCURRED WOULD FRUSTRATE THE STATUTORY PURPOSES OF THE PRIVACY ACT

The Congressional purpose for enacting the Privacy Act of 1974 was both to encourage "the widest possible citizen enforcement" of the Act's remedial protections, *see* S. Rep. No. 1183, 93rd Cong., 2d Sess. at 1, 83, *reprinted in* U.S. Code Cong. & Ad. News at 6916 & 6997 (hereinafter "USCAN"), *and Legislative History of the Privacy Act of 1974*, at 154, 236 (1976) (hereinafter "*Sourcebook*"); and, by so doing, to redress and prevent serious governmental abuses resulting in the violation of the privacy rights of citizens. *Id.*, USCAN at 6916, 6917; *Sourcebook* at 154-55 (remarks of Sen. Ervin) ("It is designed to prevent the kind of illegal, unwise, overbroad, investigation and record surveillance of law-abiding citizens produced in recent years from actions of some over-zealous investigators, and the curiosity of some government administrators, or the wrongful disclosure and use, in some cases, of personal files held by Federal agencies.").

Obviously, Congress considered the government abuse of power and misuse of personal information that existed in the years preceding 1974 when it created a remedy through the Privacy Act to compensate individuals who fell victim to such "intentional or willful" governmental abuses and

deprivation of personal privacy rights. Among the many concerns cited by members of Congress for enacting the Privacy Act included the "creation of the 'Plumbers,' a White House unit, and "secret" and illegal "wire-taps" and selective disclosure or misuse of private information for "political purposes," *see Sourcebook* at 795-798 (remarks of Sen. Nelson), and "Watergate and related scandals" that "have brought to light a callous disregard for the law and for the sanctity of individual rights . . . " *Sourcebook* at 800 (remarks of Sen. Jackson).

Congressional findings set forth in the preamble of the Act also expressly provide, *inter alia*, that the "right to privacy is a personal and fundamental right protected by the Constitution." *See* P.L. 93-579, 88 Stat. 1896, the Privacy Act of 1974, Congressional Findings and Purpose § 2(a) (reprinted at 5 U.S.C. § 552a Note).[2] Due to the nature of the privacy rights at issue, Congress created the damages remedy in 5 U.S.C. § 552a(g)(4) "with reference to the nature of the interests protected by" the Act. *See Carey v.*

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[2] *See also, Sourcebook* at 769 (remarks of Sen. Ervin) (the Act implements "those recognized values of Western jurisprudence and democratic constitutional government" and "they are the principles upon which our own Constitution rests"); *id.* at 803 (remarks of Sen. Goldwater) ("By privacy, I mean . . . the right to be protected against disclosure of information given by an individual in circumstances of confidence, and against disclosure of irrelevant embarrassing facts relating to one's own private life . . . . " and "what the U.S. Supreme Court has referred to as the embodiment of 'our respect for the inviolability of the human personality,' and as a right which is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'").

Piphus, 435 U.S. 247, 265 (1978). Permitting the award of "actual damages" for non-pecuniary harm and emotional distress under 5 U.S.C. § 552a(g)(4) is fully consistent with the purposes and other provisions of the Privacy Act.

Significantly, the Privacy Act's preamble specifically waives sovereign immunity "by requiring Federal agencies" to "be subject to civil suit for *any* damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." *See* P.L. 93-579, 88 Stat. 1896, Congressional Findings and Purpose § 2(b)(6) (reprinted in 5 U.S.C. § 552a Note) (emphasis added). *Also see, Johnson v. Dept. of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 975 (5th Cir. 1983) (noting preamble), modified in part on other grnds by *Doe v. Chao*, 540 U.S. 614 (2004). Surely, damages for non-pecuniary harm actually incurred are a type of "*any* damages" for which suit has been expressly consented as stated in the Act's preamble.

The Privacy Act, the preamble to the Act, and the legislative history of the Act, repeatedly emphasize the importance of protecting personal privacy as a fundamental and constitutional right, and reflect a strong intent that the civil remedies and enforcement provisions further the Act's compensatory and deterrent goals. In order to avoid the absurd result of Privacy Act plaintiffs meeting the injury-in-fact and causation requirements and proving an intentional violation but having no remedy, Congress created a remedy that permits

recovery of damages that are actually incurred by the plaintiff.

To be eligible to bring a damages claim under the Privacy Act, a plaintiff must show there was an "adverse effect" resulting from the violation. 5 U.S.C. §§ 552a(g)(1)(C) and (g)(1)(D).[3] The most common "adverse effect" demonstrated by victims of Privacy Act violations is the personal effects that are suffered (such as non-pecuniary and non-physical effects like emotional distress, emotional distress or trauma) when personal or embarrassing information is improperly disclosed by a Federal agency without their consent. *See, e.g., Jacobs v. National Drug Intelligence Center,* 548 F.3d 375, 377-378 (5th Cir. 2008).

Whistleblowers and other unpopular critics of Federal agencies often confront the intentional public disclosure of their personal and embarrassing information that is supposed to be held in confidence by Federal agencies. The unauthorized release of such information by Federal agencies violates of Privacy Act's no disclosure without consent rule. 5 U.S.C. § 552a(b).

For example, the Federal Bureau of Investigation made unauthorized public releases of personal, embarrassing and confidential information about the FBI laboratory scientist and agent who

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[3] The "reference in §552a(g)(1)(D) to 'adverse effect' acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing . . . ." *Doe v. Chao,* 540 U.S. 614, 624 (2004).

reported very serious allegations that called into question the scientific integrity of the FBI crime lab and high profile prosecutions that relied on the lab's evidence, while at the same time, the FBI refused to provide that whistleblower with access to the information that the agency had released to others. *See Whitehurst v. FBI,* C.A. No. 96-572, slip op. (Feb. 5, 1997, D.D.C.). The Justice Department later agreed to settle that Privacy Act case where the whistleblower sought non-pecuniary emotional damages for the alleged violation of his privacy rights by the FBI to discredit him.[4]

The Department of Defense's unauthorized release of information from its security and personnel files about Linda Tripp is another example of the type of government abuse the Privacy Act was intended to combat. *Tripp v. Dep't. of Defense,* 219 F.Supp.2d 85, 87 (D.D.C. 2002) (The Defense Department "conceded liability for the particular disclosure to *The New Yorker* journalist as a violation of the anti-disclosure provision of the Privacy Act, 5 U.S.C. § 552a(b)."). The government's admitted violation of the Privacy Act as a means to discredit Ms. Tripp demonstrates how the government can misuse information in reprisal against unpopular whistleblowers and for political purposes. Ms. Tripp sought non-pecuniary damages

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[4] *See Justice Dept. to Pay Settlement to FBI Whistle-Blower Whitehurst*, LOS ANGELES TIMES (March 12, 1998), http://articles.latimes.com/1998/mar/12/news/mn-28216.

under the Privacy Act and the Defense Department later entered into a settlement.[5]

It is only by the recovery of damages for any harms that qualify as an "adverse effect" under 5 U.S.C. §§ 552a(g)(1)(C) and (g)(1)(D), and are proven to be actually incurred resulting from intentional or willful violations, such as intentional disclosure of embarrassing personal information by Federal agencies in violation of 5 U.S.C. § 552a(b), that the Privacy Act's statutory purposes can be fulfilled. However, a restrictive interpretation of the Act, as Petitioners urge, that narrows the scope of actual damages "would frustrate the purposes of the civil remedy" and enforcement provisions because litigants who prove intentional or willful violations of the Act would frequently be left without any remedy, and "an inadequate recovery would reduce both the deterrent impact on the government and the incentives for citizen enforcement." *See* Frederick Z. Lodge, *Damages Under the Privacy Act of 1974: Compensation and Deterrence*, 52 FORDHAM L. REV. 611, 622 (1984). *Also see, Johnson,* 700 F.2d at 977. To interpret the phrase "actual damages" in 5 U.S.C. § 552a(g)(4) to exclude damages for non-pecuniary losses for emotional distress (a harm that provides standing to sue) will frustrate the purposes of the Act and leave Privacy Act plaintiffs without any remedy at all.

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[5] *See* "Defense Dept. settles with Linda Tripp," USA Today (Nov. 3, 2003), http://www.usatoday.com/news/washington/2003-11-03-tripp-lawsuit_x.htm.

II. THE PRIVACY ACT DOES NOT PRECLUDE RECOVERY OF EMOTIONAL DISTRESS DAMAGES

A narrow construction of the term "actual damages" is not reasonable under the applicable standards of statutory construction, nor does the doctrine of sovereign immunity apply. Accordingly, it is not appropriate to construe the Privacy Act to preclude an award of emotional distress damages actually incurred by the Respondent.

Petitioners' argument in support of a narrow construction relies, in part, on the report of the Privacy Protection Commission in 1977. Pet. Br., pp. 19-22. However, Congress did not delegate to the Privacy Commission congressional authority to define the term "actual damages" in the Privacy Act or to decide whether the Act provides for the recovery of non-pecuniary compensatory damages. Rather, the Commission was asked to review a much more narrow question, whether the Federal government should be liable for general damages for violations of the two provisions of the Act which confer standing to sue. *See Doe v. Chao*, 540 U.S. 614, 622 (2004). Specifically, Congress asked the Commission to study "whether the Federal Government should be liable for general damages incurred by an individual as the result of a willful or intentional violation of the provisions of sections 552a (g)(1)(C) or (D) of title 5, United States Code." P.L. 93-579, § 5(c)(2)(B)(iii), 88 Stat. 1907.

The Commission's recommendations were flawed. In its report, the Commission relied only on the Act's legislative history and the statute to conclude that the term "actual damages" was intended to be synonymous with "special damages" in defamation cases. *Personal Privacy in an Information Society: The Report of the Privacy Protection Commission*, Chapter 13 (July 1977). However, the Commission's report in this respect is incomplete and does not analyze the case law that was in effect prior to passage of the Privacy Act that defined "actual damages" to include emotional distress damages. Nor does the Commission construe the Act in accordance with its purpose or evaluate whether precluding monetary recovery for emotional distress as "actual damages" would frustrate the Privacy Act's purpose.

Congress never acted upon or adopted the Commission's recommendations or unsupported opinions. Petitioners cite no authority to support according deference to a post-enactment Commission report that was unsupported by any citations to relevant legal authorities or legislative history, and that was never adopted by Congress. There is no basis at all for this Court to accord any deference or weight to the Privacy Commission's post-enactment report when construing the meaning of the Privacy Act's damages provision. *See Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081-82 & n.72 (2011) (Scalia, J.) (post-enactment remarks and reports by members of Congress are not a "legislative history" in any sense or a "legitimate tool of statutory interpretation); *see also id.* at 1092 (Sotomayor, J.

dissenting) (describing such materials as a hazardous basis from which to infer the intent of the enacting Congress").

By contrast, the term "actual damages" was understood in the general law and by Congress in 1974 to include recovery for non-pecuniary harm, such as for emotional distress, humiliation and damage to reputation, as well as pecuniary harm. Resp. Br., pp. 12-13. When Congress enacted the Privacy Act it expressly stated that the statute's purpose was to prove a remedy to include redress such non-pecuniary harm. *Id.* at pp. 14-17. The prevailing common law and dictionary definition of "actual damages" in use at the time the Privacy Act was enacted included awards for proven emotional distress injuries. *Id.* at pp. 18-25. Additionally, the contemporaneous construction of other federal statutes enacted prior to the Privacy Act shows that Congress had used the terms "actual damages" and "compensatory damages" as synonymous terms to include awards for non-pecuniary harm. *Id.* at pp. 25-33.

To narrowly construe the Privacy Act's damages provision to preclude recovery of damages for documented emotional distress or humiliation that is actually suffered by a Privacy Act plaintiff, as urged by the Petitioners, would misconstrue the commonly understood meaning of the term "actual damages" when Congress enacted the Privacy Act. This Court should construe the Privacy Act in accordance with Congress' intent to create a viable remedy to redress the harm most commonly suffered by persons whose

privacy rights are violated when both non-pecuniary harm and willful or intentional violations of the Act are actually proven.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

DAVID K. COLAPINTO
STEPHEN M. KOHN
NATIONAL WHISTLEBLOWER
LEGAL DEFENSE AND
EDUCATION FUND
3238 P Street, NW
Washington, DC 20007
(202) 342-6980
dc@whistleblowers.org
Counsel for Amicus Curiae
National Whistleblower Center